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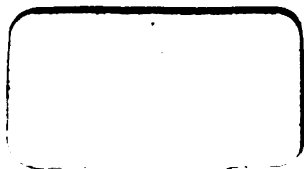
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*11 H. Hist. Court of Bankruptcy*

**R E P O R T S**

28

OF

**CASES IN BANKRUPTCY,**

DECIDED BY

*THE COURT OF REVIEW,*

THE VICE-CHANCELLOR

SIR JAMES LEWIS KNIGHT BRUCE,

AND

THE LORD CHANCELLORS

LORD LYNTHURST AND LORD COTTENHAM.

---

BY

**JOHN P. DE GEX, ESQ.,**

OF LINCOLN'S INN, BARRISTER AT LAW.

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### **Lord Chancellors.**

**LORD LYNDHURST**—resigned the Great Seal in July, 1846.

**LORD COTTENHAM.**

---

### **Court of Review.**

|  |                   |
|--|-------------------|
| <b>SIR JAMES LEWIS KNIGHT BRUCE</b> , Chief Judge, | } of the Court of |
| <b>SIR GEORGE ROSE</b> , Judge,                    |                   |

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The Court of Review was abolished by Act of Parliament on the 1st of September, 1847. See post, Appendix, page v.

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On the 2nd of November, 1847, the Lord Chancellor appointed that the Jurisdiction of the Court of Review should be exercised by the Vice-Chancellor **SIR JAMES LEWIS KNIGHT BRUCE**. See post, page 574.



## TABLE OF CASES.

|                                  | Page |                                   | Page     |
|----------------------------------|------|-----------------------------------|----------|
| ACRAMAN, Re, Ex parte Webster    | 414  | Buchanan, Ex parte, Re Birley     | 344      |
| ——— Re, Ex parte Hinton          | 550  | Buckland, Re, Ex parte Reid ..    | 600      |
| Anonymous .. .. .                | 334  | Burbidge, Ex parte, Re Clark      | 256      |
| Arbouin, Ex parte, Re Reay ..    | 359  | Burdis, Ex parte, Re Thompson     | 406      |
| Archer, Re, Ex parte Cunliffe .. | 408  | Butterfield, Ex parte, Re Butter- |          |
| ——— Re, Ex parte Shuckhard       | 454  | field .. .. .                     | 319, 570 |
| Barber, Ex parte, Re Tring,      |      | Carey, Re, Ex parte Hall ..       | 555      |
| Reading, and Basingstoke         |      | Carwood, Re, Ex parte Bingley     | 635      |
| Railway Company .. ..            | 381  | Cavendish, Re, Ex parte Hembury   | 442      |
| Barff, Ex parte, Re Cousen ..    | 613  | Charles, Re, Ex parte Barton ..   | 316      |
| Barker, Re, Ex parte Hind ..     | 161  | Cheeseborough, Ex parte, Re       |          |
| Barnett, Ex parte, Re Reay ..    | 194  | Fearnley .. .. .                  | 333      |
| Barton, Ex parte, Re Charles ..  | 316  | Clark, In Re .. .. .              | 153      |
| Barwise, Re, Ex parte Cocks ..   | 446  | —— Re, Ex parte Burbidge ..       | 256      |
| Baylies, Ex parte, Re Gibbs ..   | 440  | —— Re, Ex parte Harris ..         | 162      |
| Beattie, Re, Ex parte Kelsall .. | 352  | —— Re, Ex parte Stokes ..         | 619      |
| Bell, Ex parte, Re Tunstall ..   | 577  | Closson, Re, Ex parte Harris ..   | 165      |
| Benbow, Ex parte, Re Benbow ..   | 443  | Cocks, Ex parte, Re Barwise ..    | 446      |
| Berrenger, Re, Ex parte Teague   | 140  | Collins, Ex parte, Re Rickett ..  | 381      |
| Bingley, Ex parte, Re Carwood    | 635  | Congreve, Ex parte, Re Oliver ..  | 267      |
| Birley, Re, Ex parte Buchanan    | 344  | Corser, Ex parte, Re Cox ..       | 576      |
| Blackburn, Re, Ex parte Hall ..  | 332  | Cousen, Re, Ex parte Barff ..     | 613      |
| Bosanquet, Ex parte, Re Wilson   | 432  | —— Ex parte, Re Cousen ..         | 451      |
| Bowner, Ex parte, Re Pulvertoft  | 343  | Cox, Re, Ex parte Corser .....    | 576      |
| Bowring, Re, Ex parte Lawrence   | 269  | Cramp, Ex parte, Re Dering ..     | 398      |
| Bromage, Ex parte, Re Jones ..   | 375  | Cunliffe, Ex parte, Re Archer ..  | 408      |
| Brutton, Ex parte, Re Fisher ..  | 116  | Cuthbert, Re, Ex parte Follett .. | 212      |

## TABLE OF CASES.

|                                  | Page |                                  | Page |
|----------------------------------|------|----------------------------------|------|
| Davis, Ex parte, Re Davis ..     | 267  | Hembury, Ex parte, Re Cavendish  | 442  |
| Dering, Ex parte, Re Cramp ..    | 398  | Hemsworth, Re, Ex parte Under-   |      |
| Diamond, Ex parte, Re Diamond    | 143  | wood .. .. .                     | 190  |
| Dobbs, Re, Ex parte Ralph ..     | 219  | Higginson, Re, Ex parte Lee ..   | 628  |
| Dockery, Re, Ex parte Jerwood    | 373  | Hind, Ex parte, Re Barker ..     | 161  |
| Downes, Ex parte, Re Garbett ..  | 390  | Hinton, Ex parte, Re Acraman     | 550  |
| Dutchman, Re, Ex parte Louch     | 463  | Hodson, Ex parte, Re Hodson ..   | 374  |
|                                  |      | Hopkins, Ex parte, Re Forsyth    | 204  |
| Fearnley, Re, Ex parte Cheese-   |      | Hornby, Ex parte, Re Pritchard   | 69   |
| borough .. .. .                  | 333  | Hughes, Ex parte, Re Osborne     | 387  |
| Ferens, Re, Ex parte Jackson ..  | 609  | Humberston, Re.. ..              | 262  |
| Fidgeon, Re, Ex parte Parsons..  | 342  | ——— Re, Ex parte Moly-           |      |
| Fisher, Re, Ex parte Brutton ..  | 116  | neux .. .. .                     | 121  |
| Flower, Ex parte, Re Flower ..   | 503  | Humphreys, Re, Ex parte Gover    | 349  |
| Follett, Ex parte, Re Cuthbert.. | 212  | Hunt, Re, Ex parte Simpson ..    | 9    |
| Forsyth, Ex parte, Re Hopkins    | 204  |                                  |      |
| Forth Marine Insurance Co., Re   | 335  | Jackson, Ex parte, Re Ferens ..  | 609  |
| Fripp, Ex parte, Re Phelps ..    | 293  | Jerwood, Ex parte, Re Dockery    | 373  |
|                                  |      | Jones, Re, Ex parte Bromage ..   | 375  |
| Gales, In Re .. .. .             | 100  | —— Ex parte, Re Jones ..         | 28   |
| Garbett, Re, Ex parte Downes ..  | 390  |                                  |      |
| Garnett, Ex parte, Re Garnett .. | 95   | Kelsall, Ex parte, Re Beattie .. | 352  |
| Gibbs, Re, Ex parte Baylies ..   | 440  | Kennedy, Re, Ex parte Law ..     | 378  |
| —— Ex parte, Re Gibbs ..         | 1    |                                  |      |
| —— Re, Ex parte Grimstead..      | 72   | Lane, Ex parte, Re Lendon ..     | 300  |
| Goodall, Ex parte, Re Goodall .. | 580  | Law, Ex parte, Re Kennedy ..     | 378  |
| Gould, Ex parte, Re Gould ..     | 29   | Lawrence, Ex parte, Re Bowring   | 269  |
| Gover, Ex parte, Re Humphreys    | 349  | Layt, Re, Ex parte Morse ..      | 478  |
| Graham, Ex parte, Re Gray ..     | 328  | Lee, Ex parte, Re Higginson ..   | 628  |
| Gray, Re, Ex parte Graham ..     | 328  | Leicestershire Banking Company,  |      |
| Greaves, Ex parte, Re Price ..   | 119  | Ex parte, Re Wilders .. ..       | 292  |
| Greenstock, Ex p., Re Greenstock | 230  | Lendon, Re, Ex parte Lane ..     | 300  |
| Griffiths, Ex parte, Re Paterson | 597  | London and Birmingham Exten-     |      |
| Grimstead, Ex parte, Re Gibbs    | 72   | sion and Northampton, Daven-     |      |
|                                  |      | try, Leamington aud Warwick      |      |
| Hall, Ex parte, Re Blackburn ..  | 332  | Railway Company, Re, Ex          |      |
| —— Ex parte, Re Carey ..         | 555  | parte Morrison .. .. .           | 539  |
| Hammond, Ex p., Re Hammond       | 93   | Louch, Ex parte, Re Dutchman     | 463  |
| Harford, Re, Ex parte Poulson..  | 79   |                                  |      |
| Harris, Ex parte, Re Clarke ..   | 162  | Mackie, Re, Ex parte Tagart ..   | 531  |
| —— Ex parte, Re Closson ..       | 165  | Majoribanks, Ex parte, Re Rainy  | 466  |
| —— Re, Ex parte Mitchell ..      | 257  | Marshall, Re .. .. .             | 273  |
|                                  |      | Martin, Ex parte, Re Martin ..   | 485  |



## TABLE OF CASES.

vii

|  | Page    |   | Page |
|--|---------|---|------|
| Martin, Re, Ex parte Turner ..   | 30      | Poulson, Ex parte, Re Harford..             | 79   |
| ——— Re, Ex parte Van Sandau .. .. .  | 55, 303 | Powell, Ex parte, Re Vaughan..              | 405  |
| Megarey, Ex parte, Re Megarey  | 157     | Price, Re, Ex parte Greaves ..              | 119  |
| Meyer, Ex parte, Re Meyer ..   | 632     | Pritchard, Re, Ex parte Hornby              | 69   |
| Miles, Ex parte, Re Porter ..  | 623     | Pulvertoft, Re, Ex parte Bowner             | 343  |
| Miller, Ex parte, Re Miller ..   | 144     | ——— Re, Ex parte Sturton                    | 341  |
| Miskin, Re, Ex parte Philpot ..  | 346     | Rainy, Re, Ex parte Majoribanks             | 466  |
| Mitchell, Ex parte, Re Harris ..   | 257     | Ralph, Ex parte, Re Dobbs ..                | 219  |
| Molyneux, Ex parte, Re Humberston.. .. .   | 121     | Reay, Re, Ex parte Arbouin ..               | 359  |
| Montefiore, Ex parte, Re Montefiore .. .. .  | 171     | ——— Re, Ex parte Barnett ..                 | 194  |
| Moore, Ex parte, Re Westrop ..   | 173     | Rees, Ex parte, Re Scowcroft ..             | 205  |
| Morrison, Ex parte, Re London and Birmingham Extension and Northampton, Daventry, Leamington and Warwick Railway Company .. .. . | 539     | Reid, Ex parte, Re Buckland ..              | 600  |
| Morse, Ex parte, Re Layt ..  | 478     | Reynolds, Ex parte, Re Reynolds             | 373  |
| Newlands, Ex parte, Re Newlands  | 150     | Rickett, Re, Ex parte Collins ..            | 381  |
| Nicholls, Ex parte, Re Nicholls  | 331     | Robbins, Re, Ex parte Shaw ..               | 242  |
| Norton, Ex parte, Re Robinson  | 504     | Robinson, Re, Ex parte Norton               | 504  |
| Oldaker, Ex parte, Re Oldaker  | 591     | Rothery, Ex parte, Re Rothery               | 565  |
| Oliver, Re, Ex parte Congreve..  | 267     | Rowe, Ex parte, Re Rowe ..                  | 111  |
| Osborne, Re, Ex parte Hughes   | 387     | Scowcroft, Re, Ex parte Rees ..             | 205  |
| Oxtoby, Ex parte, Re Oxtoby ..   | 453     | Sedgwick, Re, Ex parte Watts..              | 265  |
| Parsons, Ex parte, Re Fidgeon ..   | 342     | Shaw, Ex parte, Re Robbins ..               | 242  |
| Paterson, Re, Ex parte Griffiths   | 597     | Shuckhard, Ex parte, Re Archer              | 454  |
| ——— Ex parte, Re Williams  | 158     | Simpson, Ex parte, Re Hunt ..               | 9    |
| Payne, Re, Ex parte Spooner ..   | 575     | Spence, Re, Ex parte Stamp ..               | 345  |
| ——— Ex parte, Re Taverner ..   | 534     | Spooner, Re, Ex parte Payne ..              | 575  |
| Pennell, Ex parte, Re Sustenance   | 566     | Stamp, Ex parte, Re Spence ..               | 345  |
| Perry, Ex parte, Re Perry ..   | 377     | Stephenson, Ex parte, Re Stephenson .. .. . | 586  |
| Phelps, Re, Ex parte Fripp ..  | 293     | Stokes, Ex parte, Re Clark ..               | 619  |
| Philpot, Ex parte, Re Miskin ..  | 346     | Sturton, Ex parte, Re Pulvertoft            | 341  |
| Poole, Ex parte, Re Symes ..   | 581     | Sustenance, Re, Ex parte Pennell            | 566  |
| Porter, Re, Ex parte Miles ..  | 623     | Symes, Re, Ex parte Poole ..                | 581  |
| Potts, Ex parte, Re Potts ..   | 326     | Tagart, Ex parte, Re Mackie ..              | 531  |
|  |         | Taverner, Re, Ex parte Payne ..             | 534  |
|  |         | Teague, Ex parte, Re Berrenger              | 140  |
|  |         | Thomas, Ex parte, Re Thomas..               | 612  |
|  |         | Thompson, Re, Ex parte Burdis               | 406  |
|  |         | Todd, Re.. .. .                             | 87   |
|  |         | ——— Re, Ex parte Wood ..                    | 134  |
|  |         | Tring, Reading and Basingstoke              |      |

## TABLE OF CASES.

|  | Page    |  | Page |
|--|---------|--|------|
| Railway Company, Re, Ex parte                  |         | Watts, Ex parte, Re Sedgwick ..                          | 265  |
| Barber .. .. .                                 | 381     | Webster, Ex parte, Re Acraman                            | 414  |
| Tunstall, Re, Ex parte Bell ..                 | 577     | Westrop, Re, Ex parte Moore ..                           | 173  |
| Turner, Ex parte, Re Martin ..                 | 30      | Wilders, Re, Ex parte The Leicestershire Banking Company | 292  |
| Underwood, Ex parte, Re Hems-<br>worth .. .. . | 190     | Williams, Re, Ex parte Paterson                          | 158  |
| Van Sandau, Ex parte, Re Mar-<br>tin .. .. .   | 55, 303 | Wilson, Re, Ex parte Bosanquet                           | 432  |
| Vaughan, Re, Ex parte Powell ..                | 405     | Wood, Ex parte, Re Todd ..                               | 134  |
|  |         | Woodhead, Re   | 99   |
|  |         | Worth, Re, Ex parte Young ..                             | 146  |
|  |         | Young, Ex parte, Re Worth ..                             | 146  |

## ERRATA.

- Page 34 in margin, *for (b) read (c), for (c) read (d), for (d) read (e), for (e) read (b).*  
 „ 35 in margin, *for 208 read 268.*  
 „ 63 line 10, *after “ and ” read “ the Court.”*  
 „ 100 date, *for 1844 read 1845.*  
 „ 108 line 5, *for “ refused ” read “ referred.”*  
 „ 227 line 6, *for “ which ” read “ while.”*  
 „ 344 in marginal note, and line 4 from bottom, *for “ Accountant General ” read “ Ac-  
 countant in Bankruptcy.”*  
 „ 347 line 23, *dele “ not.”*  
 „ 349 line 4, *dele “ although.”*  
 „ 373 in marginal note, and lines 16 and 19, *for “ Accountant General ” read “ Ac-  
 countant in Bankruptcy.”*  
 „ 612 lines 4 and 5 from bottom, *for “ debts due to the creditors were ” read “ debt due  
 to the creditor was.”*

## APPENDIX.

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*Ex parte* HARRISON, *re* GALES.

*Extract from the Chief Judge's Note Book. See ante p. 100.*

In this case my judgment was not committed to writing, and the grounds of the decision were not, I think, stated by me in Court so fully as they might and perhaps ought to have been, especially when I was admitting a proof that had been rejected by a Commissioner of so much weight as Mr. Ellison. They were in substance these :

1. The question upon the Ship Register Act was not argued or raised before him, and the proof was not rejected with any reference to that Act.
2. The assignees declined to try the question upon the Ship Register Act, in an action against the bankrupt *Gales*, to be defended by them, which I was willing to direct with proper admissions for the purpose, and which the petitioners consented (as I understood) to bring, under the direction of the Court.
3. It was not proved or alleged that there had been any "average damage or loss by perils of the sea, fire or other perils," nor was there any evidence or allegation on either side as to the time necessary or required for discharging the cargo, or in any respect as to her cargo, or as to repairs.
4. It was admitted that the ship, having arrived at her port of discharge in England in March, 1842, was fit and ready to be delivered on the vendor's part to *Gales* or his assignees, in pursuance of the contract, in or before May, 1842, that there had not been any breach, default or omission upon the vendor's or the petitioners' part, and that, assuming the validity of the contract, the petitioners or the vendor had acquired a right under it, in the events which had taken

place, to recover against *Gales*, as so much of the 4000*l.* purchase money, the sum sought to be proved. Nor did I understand it to be disputed, that if *Gales's* bankruptcy had taken place not before but after the resale of the ship, the proof must have been admitted.

5. I was of opinion that had *Gales's* bankruptcy taken place not before but subsequently to the time when the ship, after her arrival at her port of discharge, became as against each party deliverable under the contract to *Gales* as purchaser (he doing what it was incumbent on him to do), the case in all other respects (including the fact that the resale was after the bankruptcy) standing as actually it did, and the validity of the contract being assumed, there would, upon principle and upon *Bowles v. Rogers*, 1 Cooke, B. L. 146, 8th edit. ; *Ex parte Hunter*, 6 Ves. 94 ; *Ex parte Gyde*, 1 G. & J. 223 ; *Hope v. Booth*, 1 B. & Ad. 498 ; *Ex parte Moffat*, 2 M. D. & D. 170, and other authorities, have been certainly a right to prove the sum sought to be proved.

6. Upon the assumption of the validity of the contract, I thought also, considering some of the authorities already mentioned and others (including the language of the Chief Justice of the Common Pleas in *Ex parte Tindal*, 8 Bing. 402, and of Lord Denman in *Farley v. Briant*, 3 Ad. & Ell. 839), that *Gales* the bankrupt, by entering into the agreement (which was to become void in case the ship should be lost and thereby prevented from arriving in the united kingdom), had before the bankruptcy contracted a debt payable upon a contingency within the meaning of the 56th section of the statute 6 Geo. 4, c. 16, subject only to the question whether, if the debt or the contingency which had not happened when the fiat issued was when the fiat issued impossible to be valued, that circumstance ought to prevent the application of the section.

7. I was not satisfied, considering the facilities of marine insurance and how generally notorious and familiar the rates and calculations upon which merchants and shipowners effect ordinary marine insurances are, that in this case when the fiat was issued it was impossible to value the debt or contingency, though I did not mean to give nor indeed did I form an opinion upon this point.

8. Assuming the contingency to have been when the fiat was issued incapable of valuation, but assuming also that subject to that difficulty *Gales* had before the bankruptcy contracted by the agreement a debt payable upon a contingency which had not happened before the fiat, I was not aware of any authority for treating such a state of things as conclusive against the right of proof; and, on the contrary, there appeared to me to be authority of considerable weight in favour of the proposition, that in the case just supposed the removal of all uncertainty by the happening of the contingency before dividend declared and before certificate obtained renders the debt proveable, as *Ex parte Lewis*, Mont. & Mac. 426; *Ex parte Myers*, Mont. & Bl. 229; *Ex parte Simpson*, 1 Mont. & Ayr. 563; cases with which the judgment delivered by *Tindal*, C. J. in *Thompson v. Thompson*, 2 Bing. N. C. 168, seems consistent.

9. And in the present case there had been, as I understood, neither dividend nor certificate. What my decision would have been had it been shown that there had been a final dividend or perhaps any dividend declared, or that the certificate had been obtained before the ship became under the agreement deliverable to *Gales* or his assignees, I am not sure. It is very possible that I should in that case have dismissed the petition. It may be observed, however, that in *Ex parte Grundy*, Mont. & Mac. 293, it seems probable at least that dividends (not a final dividend) had been declared before the happening of the contingency, nor is it clear to me that there the debt or contingency was, at the time of the bankruptcy, (which had occurred long before the 6 Geo. 4), or was at the passing of the statute 6 Geo. 4, or when either of the dividends was declared, or when the certificate was obtained, capable of valuation. The contingency there was that of the bankrupt being survived by his wife or by any issue of his marriage with her. He obtained his certificate, though whether in her lifetime or, in what year the wife died, does not appear, but he survived her and was survived by issue of the marriage, and upon an application to prove made after the bankrupt's death the proof was admitted. I suppose that at least before a child had come into existence, the debt or con-

## APPENDIX.

tingency could not during the joint lives of the bankrupt and his wife have been valued, and the children of the marriage might in the bankrupt's lifetime have died leaving issue. On the whole in the present case, notwithstanding the opinion of Mr. Ellison (than whom there is not, I believe, a man in or out of the Court of Bankruptcy better qualified in any respect to administer justice in bankruptcy), notwithstanding also the cases of *Boorman v. Nash*, 9 B. & C. 145, and *Green v. Bicknell*, 8 Ad. & E. 701, (cases that I have repeatedly considered with the great attention due to them, and with one or both of which I am not sure that my decision may not be justly thought consistent), it appeared to me (assuming the validity of the contract and the absence of dividend and of certificate) that by rejecting the proof I should be contravening or disregarding other authorities (the names of some though not all of which I have mentioned), that I thought it impossible for me with propriety to contravene or disregard. Nor perhaps was it wholly irrelevant to bear in mind that the statute 6 Geo. 4, c. 16, is directed by the legislature to be construed beneficially for creditors.

## APPENDIX.

v

10 & 11 VICT. c. 102.

*An Act to abolish the Court of Review in Bankruptcy, and to make Alterations in the Jurisdiction of the Courts of Bankruptcy and Court for Relief of Insolvent Debtors.* [22d July, 1847.]

WHEREAS it is expedient to abolish the Court of Review in Bankruptcy, and to make alterations in the jurisdiction of the Courts of Bankruptcy and Court for Relief of Insolvent Debtors; be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same, that the Court of Review in Bankruptcy and the offices of the chief judge and other judges of the Court of Bankruptcy be hereby abolished.

Court of Review abolished.

2. And be it enacted, That all the jurisdiction, powers, authorities, and privileges of the said Court of Review in Bankruptcy hereby abolished shall be transferred to and vested in and shall hereafter be exercised and enjoyed by such one of the Vice-Chancellors of the High Court of Chancery as the Lord Chancellor shall from time to time be pleased to appoint, and that all persons now holding office or acting in the said Court of Review shall continue to hold the same, and to perform the duties thereof under the jurisdiction hereby created, in the same manner and under the same tenure and subject to the same regulations as they now hold the same and act therein: Provided always, that notwithstanding the passing of this act the present judges of the Court of Review shall be entitled to the same rank and precedence to which they are now entitled.

Jurisdiction of Court of Review transferred to one of the Vice-Chancellors.

3. And be it enacted, That all laws, orders, and authorities touching the practice and manner of proceeding in the said Court of Review, and appealing to and from the said Court, shall continue in force, and be applicable to the jurisdiction of the said Vice-Chancellor so appointed; and that all sums and fees shall continue to be payable and receivable by the

Laws and orders to apply to Vice-Chancellor so sitting.

like persons, and shall continue to be paid and applied to the like purposes, as the same have heretofore been paid and received in respect of any matter in the said Court of Review.

Jurisdiction of Courts of Bankruptcy under 5 & 6 Vict. c. 116, 7 & 8 Vict. c. 96, and 8 & 9 Vict. c. 127, transferred to Court for the Relief of Insolvent Debtors and to the County Courts.

4. And be it enacted, That from the time this act shall commence and take effect all power, jurisdiction and authority given to her Majesty's Court of Bankruptcy and District Courts of Bankruptcy, and to the Commissioners thereof, in matters of insolvency, by an act passed in the sixth year of the reign of her Majesty, intituled "An Act for the Relief of Insolvent Debtors," and by an act passed in the eighth year of the reign of her Majesty, intituled "An Act to amend the Law of Insolvency, Bankruptcy, and Execution," and by an act passed in the ninth year of the reign of her Majesty, intituled "An Act for better Securing the Payment of Small Debts," or by the rules and orders made in pursuance of any of the said Acts, shall be transferred to and vested in the Court for the Relief of Insolvent Debtors in England, and to and in the Commissioners thereof for the time being, and to and in the County Courts constituted or to be constituted under an act passed in the tenth year of the reign of her Majesty, intituled "An Act for the more easy Recovery of Small Debts and Demands in England, in manner hereinafter mentioned."

9 & 10 Vict. c. 95.

Power to Secretary of State to order what fees are to be paid to officers under 9 & 10 Vict. c. 95, and this act.

Until such order made, clerks and bailiffs to receive all fees as heretofore.

13 (a). And be it enacted, That it shall be lawful for one of her Majesty's principal Secretaries of State, with the consent of the Commissioners of her Majesty's treasury, from time to time to order what fees shall be paid and received by the several officers, or otherwise under and by virtue of the said recited act, passed in the tenth year of the reign of her Majesty and of this act, and the amount of such fees respectively; and that until such order shall be made the clerks of the several County Courts shall have and receive for their own use all fees which have heretofore been taken under any of the aforesaid acts by any officer of the Court of Bankruptcy, or by any officer or other person of or connected with the Court for the Relief of Insolvent Debtors, except as hereinafter mentioned, for business which is by this act

(a) The omitted sections relate to the jurisdiction in insolvency only.



## APPENDIX.

vii

transferred to the County Courts; and that the several high bailiffs acting as messengers under this act as aforesaid shall have and receive for their own use all fees which have heretofore been paid to the messengers of the Court of Bankruptcy, when doing the business by this act directed to be done by such bailiffs.

14. And whereas it may be expedient that the Court of Bankruptcy in London should hold sittings in matters of bankruptcy at some place or places within the district over which the jurisdiction of such Court extends, at which such Court hath not hitherto been used to sit; be it declared and enacted, That it shall be lawful for the Lord Chancellor, at any time or times whenever it shall appear to him to be expedient, by any order or orders to give the necessary directions in that behalf, ordering any Commissioner, registrar, official assignee, messenger, or usher of the Court of Bankruptcy in London, to sit and attend and act in the prosecution of any fiat in bankruptcy at any place elsewhere within such district than in the city of London; and every Commissioner, registrar, official assignee, messenger, and usher so sitting, attending and acting, shall have the like power, jurisdiction and authority as if sitting, attending and acting in the prosecution of such fiat in London.

Lord Chancellor may give directions for sittings of Court of Bankruptcy elsewhere than in London.

15. And be it enacted, That any Commissioner or registrar so sitting and acting shall have paid to him, in addition to his salary, by the Governor and Company of the Bank of England, by virtue of any order or orders of the Lord Chancellor, to be made from time to time for that purpose, out of the interest and dividends that have arisen or may arise from the securities now or hereafter to be placed in the Bank of England to an account there intituled "The Bankruptcy Fund Account," (but subject and without prejudice to any prior charges on the same,) such sum of money for travelling and other expenses as the Lord Chancellor shall deem fit.

Lord Chancellor may order payment of travelling and other expenses.

16. And be it enacted, That the forms given in the schedules to any of the said acts, or any forms heretofore used under the said acts, may be altered so far as to adapt them to the change of jurisdiction by this act directed.

Forms may be altered.

Vacancies not to be filled up till after the termination of the next session of parliament.

17. And be it enacted, That the office of the first one of the Commissioners of the Court for the Relief of Insolvent Debtors, and of the first two of the Commissioners of the Court of Bankruptcy in London, which shall become vacant after the passing of this act, shall not be filled up until after the termination of the session of parliament next after such vacancies shall have occurred.

Judges of County Courts incapable of being members of parliament.

18. And be it enacted, that no judge of any County Court who has been appointed or who shall hereafter be appointed to that office under or by virtue of the hereinbefore recited act, passed in the tenth year of the reign of her Majesty, intituled "An Act for the more easy Recovery of Small Debts and Demands in England," shall, during his continuance in such office, be capable of being elected or of sitting as a member of the House of Commons.

Interpretation of "Lord Chancellor."

19. And be it enacted, That the words "Lord Chancellor" shall in the construction of this act be interpreted to mean also and include the Lord Keeper and Lords Commissioners for the custody of the great seal of the United Kingdom for the time being.

Commencement of this act.

20. And be it enacted, That this act shall commence and take effect from the fifteenth day of September, one thousand eight hundred and forty-seven.

Act may be amended, &c.

21. And be it enacted, That this act may be amended or repealed by any act to be passed in this session of parliament.



# CASES IN BANKRUPTCY

ARGUED AND DETERMINED

IN

## The Court of Review, &c.

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Ex parte GIBBS.—In the matter of GIBBS.

THE petition stated that a fiat was issued against the petitioner on the 11th March, 1843, to which he surrendered on the 22nd of the same month, and delivered up all his account books, writings, papers, &c. relating to his estate, trade or dealings, &c. without concealment, withdrawal or falsification, and duly submitted himself to be examined.

That the petitioner was a money scrivener and money agent in very extensive practice.

That an accountant was employed by the petitioner to aid him in balancing his books and preparing the balance sheet, which was filed on the 29th July, 1843, on which day the assignee, with the consent of the petitioner, obtained an adjournment of his last examination for two months to examine the balance sheet, and on 29th September examination was adjourned until the 1st December, 1843.

1844.

*Lincoln's Inn,  
July 29.*

Where a bankrupt was examined before the commissioner respecting a book which the bankrupt stated that he had destroyed, the commissioner thinking, upon evidence produced before him, that the book had not been destroyed at the time stated by the bankrupt, adjourned the examination *sine die*, the Court directed the examination to proceed.

1844.

  
Ex parte  
Ginn.

That by the desire of other creditors and with the consent of the assignee, an accountant was employed on behalf of certain creditors, and to him all books, &c. were delivered up by the assignees; and on 22nd November, 1843, the accountant delivered certain requisitions for the petitioner to answer, for which purpose the petitioner's last examination was again adjourned to 16th January, 1844, when the petitioner returned full and satisfactory answers.

That the meeting was again adjourned till the 20th February, 1844.

That the petitioner readily assented to all such adjournments, giving every information in his power on all occasions, and never throwing any impediment in the way of such examinations.

That the petitioner's balance sheet was shown to be correct in every particular, and to be a faithful account of his trade dealings and transactions of upwards of twenty years, and no valid objection was made thereto.

That the petitioner was examined by counsel on the 16th January aforesaid, and answered all questions fully and satisfactorily, and no further objection being made, the petitioner concluded that all examination was at an end.

That the petitioner was then interrogated touching a vellum book with a lock to it, which it was alleged the petitioner formerly had in his possession, as to which the petitioner stated, as the fact was, that some years ago he had such a book, that it contained no reference to his dealings and transactions in the trade then carried on by him, but contained certain entries of the names of various persons who were creditors of the petitioner under a commission of bankruptcy issued against him in 1821,

and whose debts, although barred by the petitioner's certificate, the petitioner had voluntarily taken upon himself to pay, and the petitioner having subsequently, and from time to time, paid such creditors, such payments were duly entered in the petitioner's current cash ledger, wherein the same appeared, being a cash ledger delivered up by the petitioner to the official assignee, and from which current cash ledger the entries of payments were transcribed into the vellum book, and the creditors whose names appeared in such vellum book having been so paid by the petitioner, and such payments having been already duly entered in his said current cash ledger the vellum book was no longer of any use, and was accordingly destroyed by the petitioner at the time aforesaid.

1844.  
Ex parte  
Giant.

That all the entries of payments made in the vellum book had been duly transcribed from, and the same appeared in the petitioner's cash ledger then in the custody of the official assignee, which entries had been frequently pointed out by the petitioner to his opposing creditors and their counsel, the first of which bore date on the 16th December, 1823, and the last was made and bore date in the year 1831.

That *Thomas Stephens*, formerly a clerk of the petitioner, swore that he had seen such vellum book in petitioner's possession within twelve months next preceding the date of the fiat, upon which the meeting was adjourned to the 22nd February, 1844, when the assignees declared by counsel that they had not discovered any other property than what had been given up to the assignees, but felt it, nevertheless, their duty to pursue the inquiry relative to the missing book ; and *George Brian*, another of the petitioner's clerks, deposed to having also seen the said vellum book on several occasions, and certainly

1844.  
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Ex parte  
Grass.

within twelve months of the date of the fiat; and *Thomas Rutledge*, another clerk, remembered seeing a book answering the above description in 1835 and 1836, since when he had ceased to be in the petitioner's employ.

That neither of the said witnesses stated that he had ever seen the contents of such book, nor that it was at any time referred to for the purposes of the petitioner's business, nor that it was necessary to enable the petitioner, from time to time, to make out his bills of costs or other accounts against his clients.

That the petitioner submitted that the absence of such missing book could only be material with reference to the petitioner's balance sheet and accounts, and that if the books and vouchers actually delivered up to the official assignee showed the accuracy of the petitioner's accounts then that such missing book must necessarily be useless, and the precise time and mode of its destruction wholly unimportant.

That the petitioner most solemnly asserted that the said vellum book was in fact destroyed for the reasons hereinbefore stated, and as the petitioner was fully satisfied several years before the date of the fiat that it did not contain any reference to the petitioner's trade dealings and transactions, and that if the same were still in existence it would not disclose any particulars relating to the petitioner's accounts not already found in such accounts, nor afford any assistance in explaining petitioner's balance sheet or trying the accuracy thereof.

That Mr. *Holroyd*, the commissioner, stated that, from the evidence before him, it appeared to him that the said book had not been destroyed at the time alleged by the petitioner, and he thereupon adjourned the petitioner's examination *sine die*.

That the petitioner had since made repeated applications to the Commissioner either to adjourn the petitioner's last examination to a Subdivision Court or himself to pursue the examination of the petitioner's balance sheet and accounts, or to direct the official assignee to proceed to examine the same for the information of the Commissioner, so that he might judge of the materiality of such missing book with reference to the said accounts; but that the Commissioner had wholly refused the petitioner's applications and that the petitioner's examination still remained adjourned *sine die*.

The prayer was, that the Commissioner might be directed to proceed in the examination of the petitioner's accounts, and, if necessary, to report thereon to his Honor; or that his Honor would be pleased to order the petitioner to be examined before the Court of Review, together with such witnesses as to his Honor might seem meet.

This petition was supported by the affidavit of the petitioner, and there was not any affidavit in opposition.

Mr. *Swanston*, Mr. *Russell* and Mr. *E. Montagu* in support of the petition. The Commissioner has refused to proceed, which does not seem to be the mode of discovering whether there is or is not any concealment. We ask only that the investigation of the accounts may be continued; for even assuming that the Commissioner has come to a right conclusion, and even assuming that a bankrupt, upon his last examination, is to be exposed to a trial on the evidence of hostile witnesses, not merely as a brief to examine the bankrupt, but to enable the Commissioner to form a judicial decision, we submit that there is not any reason why the other matters of

1844.

Ex parte  
GIBBS.

1844.  
  
*Ex parte*  
 GIBBS.

the petition should not be investigated. [The *Chief Judge*. Why should not the other matters be proceeded with?]

Mr. *Cooper* and Mr. *Bacon* contra. The evidence on the vellum book has satisfied the Commissioner, and the Court will not interfere with his discretion, unless there is a case of gross injustice. In *Ex parte Perkins* (a), the bankrupt presented a petition, that the Commissioner might be ordered to appoint a time for the bankrupt's passing his last examination, which had been adjourned *sine die*. There had been five adjournments, the two first on application of the bankrupt. The immediate reason of the last adjournment was, that the bankrupt stated that he could not give a satisfactory account without further investigation of books, &c.; but the Court said it would presume that there was good reason for the adjournment, until the contrary was proved; and that it was a matter proper to be left to the discretion of the Commissioner, with which the Court would not interfere unless some improper conduct were proved against him, or unless the bankrupt could prove that very serious injury would be done by his not passing his last examination. The petition was consequently dismissed with costs.

Now, upon these affidavits there is not any reason why the Court should interfere with the discretion of the Commissioner, for there is not any improper conduct alleged against the Commissioner, and the prayer does not state the real object of the bankrupt, which is to overrule the Commissioner's decision.

(a) 1 M. & A. 524.



The CHIEF JUDGE.—The regular course, or the usual course, I thought, was for the Commissioner to commit, and upon committal for the bankrupt to apply for a habeas corpus. But I do not see that any evil can result from directing the assignees to proceed before the Commissioner in the examination and investigation of the bankrupt's accounts, and the further and full examination of the bankrupt, so far, in all respects, as this can be done under existing circumstances, without prejudice to the question whether the bankrupt's answers have or have not hitherto been satisfactory or sufficient, and without prejudice as to any question as to the existence or non-existence of the book alleged to be missing. Let the Commissioner be at liberty, if he shall think fit, to make any special report to the Court; and let the petition in all other respects stand over, with liberty to apply.

The result was, that the examination proceeded, and the bankrupt passed his last examination, and the petitioner's costs were paid to him out of the estate.

NOTE.—This case involves two questions of practice, which in principle are of considerable importance. 1st. *As to the use which the Commissioner may make of the examination of third persons to oppose the bankrupt's passing his last examination.* 2ndly. *As to adjournments sine die.*

With respect to the use which may be made by the Commissioner of the examination of third persons, Mr. Swanston, in his argument, treats as untenable the assumption, "that a bankrupt upon his last examination is to be exposed to a trial by the examination of opposite witnesses for the purposes, not merely of a brief to examine the bankrupt, but to enable the Commissioner to form a judicial decision."

Mr. Swanston was himself a Commissioner of great experience, and there are many Commissioners under the old system yet alive; was it

1844.

Ex parte  
Gibbs.

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*Ex parte*  
*Grass.*

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1844.

Ex parte  
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1844.

Ex parte  
Gibbs.

1844.

Ex parte  
Gibbs.

ever, I ask them, for a moment supposed that any use should be made by the Commissioners of the examination of a third person to affect the bankrupt's examination, except as a brief to examine the bankrupt? Must he not stand or fall by his own answers? Again and again have I, as counsel for the bankrupt, refused to examine witnesses so produced; and, as Commissioner, I did the best in my power to prevent my mind being warped by such testimony. I used it solely as a brief to examine the bankrupt, and for no other purpose. I remember that I was once attended by the present Lord Chief Baron (Sir F. Pollock) and Sir Thomas Wilde, who both, in the commencement of their professional labours, frequently attended as counsel in bankruptcy; and by one of these powerful advocates I was urged not to pass the bankrupt's last examination, as I could not but be convinced, by the testimony of the witnesses, that the bankrupt had not fully disclosed his circumstances. I answered, I certainly am satisfied that he has not fully disclosed. But that is the very reason why I will pass his examination; for I will not stand between him and the law, and he cannot be tried for felony until he has passed his examination. When I pass a bankrupt's examination, it does not imply that I am satisfied with his statements—I am not satisfied—I am satisfied only that I have done every thing in my power to discover the truth, and having failed, the law should take its course.

Quære I.—*Is it right that a bankrupt should be deprived of all his property, and then exposed to all the costs attendant upon a trial.*

Quære II.—*Is it right that a bankrupt, who may be indicted for felony, should be prejudiced by a trial before the Commissioner.*

With respect to adjournments *sine die*, they originated in the abuse, under the old system, by the bankrupt, in exposing the creditors to the expense of meeting upon meeting. They were invented by a Commissioner of powerful mind, without much practice, who, seeing an object before him which he thought just, was bold as to the road over which he passed to attain it. Very few lists of Commissioners acceded to the doctrine. I never did. The case appeared to me to be plain. Commit, if the bankrupt's answers are not satisfactory, or pass, but do not impede the progress of the law.

In accordance with the old practice, Sir J. L. Knight Bruce said, "*The regular or the usual course, I thought, was for the Commissioner to commit, and upon committal, for the bankrupt to apply for a habeas corpus.*"

Quære I.—Why by adjournment *sine die* is the bankrupt to be deprived of his remedy by habeas corpus?

1844.

Quære II.—Why are the creditors to be deprived of their right to indict the bankrupt?

Ex parte  
Ginn.

Quære III.—Would it be expedient that a monthly return should be made to the Lord Chancellor of the adjournments *sine die*, with the reasons for such adjournments?

B. M.

Ex parte SIMPSON.—In the matter of ROBERT HOLDSWORTH CAREW HUNT, HENRY CAREW HUNT, and EDWARD OSBORNE SMITH.

April 17,  
Nov. 6 and 13.

THIS case came on for hearing on further directions, upon the certificate of the Commissioner, to whom a reference had been directed to inquire and state when first the bankrupt, *Smith*, committed an act of bankruptcy capable of supporting the fiat.

Payment of a debt by cheque may be a fraudulent preference.

The act of bankruptcy relied on consisted of certain payments by means of cheques, which, it was contended, amounted to a fraudulent preference. The first of these cheques was for 1200*l.*, and was given to a firm of the name of *Vaughan & Co.*, to meet an accommodation acceptance of that firm in favour of one of the bankrupts; another of the cheques was for 575*l.*, and was given in respect of an acceptance by consignees, whom the bankrupts had engaged to keep clear of cash advances; the remaining cheque, which was for 200*l.*, was given to the solicitor of the bankrupts in respect of business already done, but for which no bill of costs had been delivered. These cheques were all dated and delivered on the 10th September, 1841, after the bankrupts had, at a consultation

When such payment was made without pressure, after a resolution had been come to by the debtors to suspend payment of their debts generally, it was held, under the circumstances of the case, a fraudulent preference, whether the debtors contemplated actual bankruptcy or not.

1844.  
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Ex parte  
Simpson.

with the solicitor, come to a resolution of stopping payment. After the cheques were given, but on the same day, a notice in writing was sent to the London bankers of the bankrupts to make no further payments. The remaining circumstances of the case are stated in the Commissioner's certificate as follow :

" The evidence in this case shows that the bankrupt, *Smith*, after having made up his mind, on the advice of his solicitor, to suspend his payments and to send an order to his bankers to make no more payments on his account, on Saturday the 11th September, 1841, drew three cheques on his bankers and appropriated them to the use of three different creditors, and having acquiesced in those cheques being carried in for payment immediately, and having allowed about half an hour for the payments to be made, sent the order to his bankers to pay no more. To doubt that such acts were fraudulent preferences is impossible. The bankrupt, *Smith*, says he did not contemplate bankruptcy, but hoped for an arrangement with his creditors. This I take to be immaterial. In all cases of fraudulent preferences, the true test is, was the money paid with the intention to continue the struggle against adverse circumstances, or was it paid after the resolution to yield had been taken with the intention to pay twenty shillings in the pound to one or more creditors, to the prejudice of the rest? It is impossible to doubt in this case that the cheques were drawn after the resolution to yield had been taken. But it was said that though a fraudulent preference, the act was not an act of bankruptcy. This depends upon the 6 *Geo.* 4, c. 16, s. 3, by which it is enacted, that if a trader make any fraudulent gift, transfer or delivery of any of his goods and chattels with intent to defeat or



delay his creditors, he commits an act of bankruptcy. That the act was fraudulent is clear—that it was a transfer or delivery is also clear; but it was said, it was not a transfer or delivery of goods and chattels but only of money, and the case of *Bevan v. Nunn*, 9 Bing. 107, was cited, where C. J. *Tindal* said, (p. 112), that the payment of a debt to a creditor by way of preference was not an act of bankruptcy. I am however of opinion that it is immaterial whether the payment was in money or by cheque or in any other way. The language attributed to C. J. *Tindal* is a mere dictum; it was not necessary to support the judgment in the case before him, and a fraudulent preference of a creditor by payment of money to him is just as good a test of his failing circumstances as the transfer of goods. I shall always hold it an act of bankruptcy till the contrary is decided. The transfer here was of a debt due to the bankrupt from his bankers; and a debt to a trader is undoubtedly part of his goods and chattels, debts having always been so considered, under the 72nd clause of 6 Geo. 4, c. 16, relating to reputed ownerships. I am therefore of opinion that *Smith* committed an act of bankruptcy on Saturday, the 11th September, 1841.—R. G. C. FANE.”

1844.

Ex parte  
Simsen.

Mr. *Russell* and Mr. *Mylne* in opposition to the Commissioner's certificate. The finding of the Commissioner is contrary to the law as laid down by C. J. *Tindal* in the case of *Bevan v. Nunn* (a), where it was held that payment of money could not be a delivery of goods and chattels within the meaning of 6 Geo. 4, c. 16, s. 3. [The *Chief Judge*. But in *Bevan v. Nunn* the Court held that an act of bankruptcy had been committed.]

(a) 9 Bing. 107.

1844.

Ex parte  
SIMPSON.

Because there had been there a delivery of goods, but C. J. *Tindal* clearly held that a payment of money would have been insufficient. [The *Chief Judge*. Do you contend, that though if a man gave a table or chair it may be a fraudulent preference so as to constitute an act of bankruptcy, yet if he give a purse of gold it cannot?] That was the distinction; and, as we submit, it is well founded. By giving a purse of gold you pay the debt, but you do not by giving a table or chair; the former act is the fulfilment of an existing contract, the latter the creation of a new one. If, owing money, I go to my creditor and say I have no money, but I will give you a horse, will you take it, and he consents, that is a new contract. [The *Chief Judge*. According to this argument, payment in Napoleons might be an act of bankruptcy, though payment in sovereigns could not.] They cited also *Abel v. Daniell*(a). But we contend further, that even if the case was capable of falling within the section, there has been no fraudulent preference, for the payment was only the performance of a promise made before the bankrupts had any contemplation of stopping payment.

Mr. *Swanston* and Mr. *Bacon*, in support of the Commissioner's certificate, were not called upon to address the Court.

Mr. *W. W. Cooper* appeared for the official assignee.

Nov. 6.

THE CHIEF JUDGE.—I do not mean finally to dispose of this case until I shall have looked at some of the au-

(a) 1 Moo. & Malk. 371; and see *Carr v. Burdiss*, 1 C. M. & R. 782.

thorities again, and received a communication from the Lord Chief Justice of the Common Pleas, to whom I have written; but I think it right to state my present impression.

1844.  
  
 Ex parte  
 SIMPSON.

On the 11th September, 1841, this firm was greatly in difficulty, and was known by Mr. *Smith*, one of the resident and managing partners in London, to be much in debt. It must be taken to have been then known to them that there was a very high degree of probability that the firm was in a state of insolvency;—probability, that is, that the firm was without the means of paying its debts; it is in this sense that I use the term insolvency. In truth, the result shows that this impression would have been accurate, for whereas both the fiats issued before the end of the year 1841, since which time the bankruptcy of each has been in active operation, we are now upon the 6th November, 1844, and it is admitted that there has been no dividend whatever upon this estate; nor is it suggested, that in the most favourable view of the circumstances of the firm there is any contemplation of the payment of more than 5s. in the pound.

It is plain that the firm was, on the 11th September, 1841, in a state of insolvency, and I think that it must be taken to have been known at the time to be so by Mr. *Smith*, the resident partner. Mr. *Smith* advises with his solicitor on that day, and the result of that advice was, that the firm should stop payment, that is, should not, on the following Monday, which was the next business day (the morrow for every substantial purpose), resume the trade, but that there should be either a stoppage or suspension of payment, and accordingly, under

1844.

Ex parte  
Sturgeson.

the advice and with the concurrence of the solicitor, a notice is sent to the Bank of England, who acted as bankers for the firm, and where their acceptances were made payable, and where their acceptances would be presented for payment on the Monday to the amount of several thousand pounds, not to make any further payment. The firm, therefore, on Monday, was, I do not use the words in any disrespectful sense, a dishonoured firm; it had lost its mercantile credit.

As part of the same transaction, in every sense of the expression, there was a resolution (in conformity with the advice of the solicitor) to suspend all the payments as of, or as from Saturday. In the mean time cheques were drawn in respect of debts due to different persons with whom Mr. *Smith* and his partners appear to have been on terms of friendship; one was the house of *Vaughan & Co.*, which comprised the brother of the gentleman who appears to have been the confidential clerk of the firm in question, and which appears to have been in the habit of affording them accommodation. There was, no doubt, a desire to save them harmless as far as possible, a desire that may in one sense, perhaps, be called honorable. It may be fair to suppose that there was a request or demand for the money, but I cannot hold that there was pressure. There is nothing in the evidence to warrant me in doing so in respect of this debt.

If that cheque had been sent to *Vaughan & Co.* before the resolution to stop payment on Monday, they might have stood on a different footing. It is however sent to *Vaughan & Co.* as a part of the same transaction: this was the cheque for 100*l.* Another of the cheques is

given to one of the partners, one of the bankrupts, for the purpose of relieving the liabilities of a cousin of his, of the same name, who had also assisted the firm. He knew nothing of it, but he received the benefit of it, and thereby adopted the agency of his cousin for that particular purpose. Putting myself in the situation of a jury having to determine the question, I cannot say that there was any pressure from that gentleman; it would perhaps be absurd to suggest that there was any pressure. With regard to the solicitor, the amount due to him was not known, but a rough guess was made, and a cheque for 200*l.* was given to him, and accepted as an integral part of the same transaction, in which, with his assistance, the notice was given. There was no pressure there.

I repeat that these payments were all made by traders resolved to stop payment on that which, for every mercantile purpose, may be called the next day, and without pressure.

Notwithstanding all these circumstances, it is said that, because Mr. *Smith* considers himself to have entertained the notion that this was only a suspension and not a stoppage, and because he considers himself not to have contemplated the particular form of the administration called bankruptcy, he supposed that these acts were fair.

Matters were in such a state that the course to be taken on Monday would of necessity bring all the creditors down on the parties, and there are and were then modes of compelling bankruptcy. Whatever may be his own wishes, a man may be made a bankrupt against his will. It is not unusual to take measures to compel a trader who stops payment to become bankrupt. Now, paying the greatest attention to the cases mentioned by

1844.

  
Ex parte  
SIMPSON.

1844.  
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 Ex parte  
 SIMPSON.

Mr. *Russell*, I still have before me the authority of *Poland v. Glyn*, and independently of this, the general principles of law.

¶ There are, however, two cases which appear to have been decided in the year 1836, later than the cases which have been mentioned; one is the case of *Abbott v. Burbage*, 2 Scott, 656, where I find the Lord Chief Justice *Tindal* saying this: "It is to be observed that the fiat did not issue until two years after the execution of the deed. The question was, whether the parties at the time *contemplated bankruptcy* as a probable event. The fact of insolvency is not enough to warrant the inference that bankruptcy was contemplated; for these questions never can arise except in cases of insolvency, and insolvency does not necessarily terminate in bankruptcy."

In the same year occurred a case of *Gibson v. Boutts*, 3 Scott, 229, and there I find, that in the course of the argument, Mr. Justice *Bosanquet* is represented as using these expressions: "Assuming the law to be as stated, the question here seems to be, whether or not a payment made for the avowed purpose of securing the payee against the consequences of a *probable* bankruptcy, which the trader is exerting himself to avoid (with a very faint hope of success), amounts to a fraudulent preference." On one of the counsel saying "The fact of his having desired his clerk not to deny him to any creditor was a strong circumstance to show that bankruptcy was not his object," Mr. Justice *Bosanquet* remarks, "It is a two-edged sword; it rather shows that he *had* the prospect of bankruptcy in his mind." The argument proceeds at considerable length, and next we find Lord Chief Justice *Tindal* saying this, "Though I

fully accede to the general doctrine of *Morgan v. Brundrett*, 5 B. & Ad. 296, and 2 N. & M. 280, I cannot go along with Mr. Baron *Parke* to the full extent. Where a party is in so hopeless a state of insolvency that he cannot reasonably expect to avoid bankruptcy, though he chooses to fight it off as long as possible, I cannot look upon a payment voluntarily made by him to a favoured creditor in any other light than as a payment calculated and intended to defeat the bankrupt laws." The argument then proceeds and introduces the following quotation from the judgment of Mr. Justice *Bayley* in *Gibbins v. Phillip*, 2 M. & R. 238. "By contemplation of bankruptcy is not meant the expectation of a commission issuing, but that the party is in such a state that bankruptcy is likely to follow, or that it is one of the probable results;" and a quotation also from *Stewart v. Moody*, 1 C. M. & R. 177, in which Mr. Baron *Parke* says: "It has been clearly settled, that if the necessary consequence of a man's act is to delay his creditors, he must be taken to intend it." That was so considered many years ago, and particularly in a case of *Newton v. Chantler*, 7 East, 138, decided by Lord *Ellenborough*, with which we are all familiar, and which I find cited in the following page of the report of *Gibson v. Boutts*. It is in the course of the judgment of Mr. Justice *Vaughan*, who says, "That the payment was voluntary, was plain and palpable, and, in fact, was admitted. With respect to the second question, look at the situation of the party at the time. Every man may be supposed to contemplate the necessary and ordinary consequence of his own acts. It is so laid down by Lord *Ellenborough* in *Newton v. Chantler*, 7 East, 138. 'As a general proposition,'

1844.

Ex parte  
Simpson.

1844.

  
Ex parte  
SIMPSON.

says his Lordship, 'it cannot be disputed that a conveyance by deed by a trader of all his property to a particular creditor in prejudice to the rest is an act of bankruptcy. Every man must be taken to contemplate the ordinary consequence of his own acts at the time of the act done. Here the necessary effect of the act done was to turn round all his other creditors, and prevent them from pursuing their present ordinary remedy against him for the payment of their demands, leaving them only to look to him for the future surplus, if any, being insolvent within his own knowledge at the time, and two writs out against him, he must have contemplated bankruptcy by means of arrest and lying in jail two months; and under these circumstances, he gives the bill of sale to one of his creditors, conveying all his property. Must he not then have contemplated the necessary consequence of his own act? And as such an act must have the effect of defeating or delaying all his other creditors by stripping him of all he had, and disabling him from carrying on his trade, must I not deduce the inference from it that he meant to defraud all his other creditors?' I agree that the guilt or innocence of the act depends upon the mind of the actor. What was the situation of *Green* on the 3d September, the day he made the payment in question? He had not assets to pay more than one-fourth of the acceptances that were arriving at maturity in the course of the month. The knowledge of his insolvency was before him." Mr. Justice *Bosanquet* concludes the case of *Gibson v. Boutts* by saying, "I agree with my brothers *Parke* and *Vaughan*, that it would be more satisfactory if this case were to undergo a second investigation. If a man, believing himself to be in danger of bankruptcy, volun-



tarily hands over money for the purpose of securing a favoured creditor, that, in my opinion, is a payment made in contemplation of bankruptcy within the meaning of the law as laid down upon the subject of fraudulent preference."

1844.  
Ex parte  
SIMPSON.

Now, without saying whether I adopt all that Mr. Justice *Bosanquet* has said, or whether I adopt to the letter that which Mr. Justice *Bayley* is represented to have said—the manner in which I should express myself, if I could express myself as well, seems to me nearer what I have read from Lord Chief Justice *Tindal's* observations on the case of *Morgan v. Brundrett*.

Looking at the state in which the firm was on the 11th of September—looking at that which was within the knowledge of Mr. *Smith* on the 11th of September—looking at the act which he did contemporaneously with the drawing of these three checks, and to the stoppage on Monday—and looking at what I think established—the absence of pressure for either of the three payments, and the willingness of each of the persons to whom the payments were made to wait—I am of opinion, at present, that these acts together (I do not say either of them separately—how that might be or would be I do not say—but that these three acts together), amounted to a fraudulent preference, or comprised at least an act of fraudulent preference. It is said that this depends on the meaning of the words "goods and chattels" in the third section of the act. I am at present of opinion that the payment of money by a debtor to a creditor under such circumstances is a fraudulent delivery of goods and chattels; but I reserve my judgment on that

1844.  
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 Ex parte  
 SIMPSON.

point till I shall have received a communication from the Lord Chief Justice of the Court of Common Pleas; if his Lordship shall tell me that he is of an opinion different from mine, I will anxiously reconsider the matter.

Mr. *Swanston* referred to *Holder v. Stone (a)*.

Nov. 13.

The CHIEF JUDGE.—Having since Wednesday last reconsidered this case, the authorities that were mentioned during the argument, and some others, I retain the opinion of which I expressed myself then to be, that on the 11th of September, 1841, Mr. *Smith*, one of the bankrupts, was party to acts, or one act at least, of fraudulent preference, such and so circumstanced as to constitute an act of bankruptcy, if a payment of money by a trader to a creditor by way of fraudulent preference can be of itself a “gift, delivery or transfer of any of his goods or chattels,” within the meaning of those words, as used in the statute 6 *Geo.* 4, c. 16, s. 3. Whether, if it cannot, there was an act of bankruptcy committed by Mr. *Smith* on that day, considering the case of *Cuning v. Bailey (b)*, I have not expressed, nor do I mean to express any opinion.

The grounds on which I came to the conclusion that I have stated I need not again explain. They still appear to me to be solid and sufficient. Can then a payment of money by way of fraudulent preference come of itself within the words to which I have referred? That money is among the things which the word “goods” may with correctness and propriety be used and understood as de-

(a) 11 *Mee. & Wels.* 494.

(b) 6 *Bingh.* 363; 4 *M. & P.* 36.

scribing or signifying, cannot be doubted. Certainly the word may be used under circumstances, or may in a writing be accompanied by a context, rendering an interpretation of a different kind necessary or proper. But without such a context, and without such circumstances, the word being left to its full ordinary operation, extends to money, I apprehend, clearly.

1844.

Ex parte  
SIMPSON.

Can it be said in or out of any court, criminal or civil, that a man's money is not part of his goods or chattels? It would be a waste of time, it would be endless, to cite Dictionaries, Treatises, Text Books and Reports on this point, as to which the limitations that exist, or have been supposed to exist with regard to a sheriff's power of seizure, under a writ of *fiery facias*, seem to me to make no difference.

Is there, however, a context, or are there circumstances rendering it necessary or proper to interpret the words "any of his goods or chattels" in the third section as exclusive of money? Circumstances independent of the context there can, I think, be none; for surely money must be as much within the mischief against which the statute was intended to guard, within the evil or wrong which it was intended to remedy in this respect, as any other goods or chattels. Can it be reasonable that a man, paying to a creditor in satisfaction, total or partial, of his debt, or giving to a relative, 1000*l.* in money, should not commit an act of bankruptcy, when, if under precisely the same circumstances, he had, instead of money, delivered to the creditor, in satisfaction, total or partial, of his debt, or given to the relative, plate, jewels, pictures, merchandize or bills of exchange of the same value, he would commit an act of bankruptcy?

I have mentioned bills of exchange particularly, be-

1844.

Ex parte  
SIMPSON.

cause of the case of *Cuming v. Bailey*, decided in the Court of Common Pleas in 1830. In effect I am required to say, that if in that case Mr. *Brown* had sent Lady *De la Warr* 300 sovereigns, instead of a bill of exchange for 300*l.*, there would not have been an act of bankruptcy. I am required to say that there is a substantial distinction, for the present purpose, between bills and cash. What is to be said of cheques, such as were drawn in this case? What of ordinary bank notes, country bank notes, dividend warrants, exchequer bills, foreign paper money, foreign coin, bullion? What of the case of boxes, or a purse containing, and therefore delivered with, British cash? Am I to say that by the law of England a trader holding in his right hand cash, and in his left bills of exchange, having but a day to run, accepted and generally indorsed by the first mercantile houses in London, is capable of committing an act of bankruptcy, by delivering what he has in one hand, while incapable of committing an act of bankruptcy, by delivering what he holds in the other? I cannot, without absolute necessity, impute to this country that its mercantile law is in such a condition. And without laying any stress upon the mode in which the law and the courts now view bankruptcy, not as a crime, or upon section 1 of the repealed statute of 21 *Jac.* 1, c. 19, or upon the 135th section of the statute 6 *Geo.* 4, c. 16, my opinion is, that independently of the context of the latter statute, all considerations properly belonging to the subject are in favour of holding money to be within the words. How then stands the matter of context? a question, in addressing ourselves to which, the other considerations that I have been mentioning must not be forgotten. It has

been said, that neither the word "pay," nor the word "payment," is in the 3rd section. This is true. But whether the word "transfer" can or cannot be considered as properly applicable to "money," the word "gift" is properly applicable, and very commonly applied—and the word "delivery" is applicable, without incorrectness or impropriety, and is sometimes applied, to "money." It is indeed observable, that in an earlier part of the section, with reference to an act of bankruptcy of another kind, there are the words "goods, money or chattels," corresponding with the language of the statute 1 *Jac.* 1, c. 15. But, upon reflection, I think this not a circumstance of any weight or account against the other considerations to which I have alluded, even if a good reason for inserting the word "money" there (not applicable to the provision in question, though intended to cover money) could not be—as probably one can be—suggested. Nor do I recollect that this particular point was taken in the argument.

It does not appear to me that anything can turn on the expression "monies or estates" in the 2nd section, or upon the language of the 8th section, though that deserves attention, as comprising the word "pay," the word "money," and the words "give or deliver." It does not, however, comprise the word "goods," or the word "chattels," nor does the corresponding section, somewhat differently worded, of the statute 5 *Geo.* 2, c. 30, though deserving consideration, as mentioning the payment of money besides, but certainly before, the delivery of goods, influence my mind as to the section of the statute 6 *Geo.* 4 now in question.

With regard to the 72nd section, the words, there, are "goods or chattels." It does not contain the word

1844.



Ex parte  
SIMPSON.

1844.  
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*Ex parte*  
*Simmons.*

"money," or the word "debts." But the section extends certainly to debts, and I can conceive cases in which it might and ought to extend to cash in the possession of the bankrupt, distinguishable from his own, and identified as not his own.

As to the 73rd section, it may be remarked, that the words "delivered or made over" are not applied to the words "goods or chattels." The words so applied are only "conveyed, assigned or transferred." It differs importantly from section 5 of the statute 1 *Jac.* 1, c. 15, upon which *Ex parte Shoreland*, 7 Ves. 88, mentioned also in 1 *Rose*, 210, and *Kensington v. Chantler*, 2 M. & S. 38, were decided; and though I have noticed what Lord *Ellenborough* says in the latter case, as to the absence of the word "money," which, however, is not all that he says, it appears to me that the nature of that enactment precluded the possibility of arriving at any other conclusion in *Kensington v. Chantler* than the decision of the Court of B. R., and it seems to me, that had that case turned upon the statute 6 *Geo.* 4, instead of the 1 *Jac.* 1, the decision would probably and ought to have been the same, but that the question upon the 3rd section of the statute 6 *Geo.* 4, c. 16, is, from the different wording, nature, and object, of that section, not affected by any such consideration. It has been suggested that the language of the 81st and 82d sections, by reason of the words "such payment not being a fraudulent preference of such creditor," being in the latter, while there is not any similar or analogous expression or provision in the former, shows that a payment of money was not intended to come within the words "gift, transfer or delivery," &c. in section 3. I find myself, however, unable to accede to that argument.

By the manner in which section 81 is worded, and especially in which the words "*bonâ fide*" are there placed, the insertion of a provision or exception against acts of fraudulent preference was rendered unnecessary, and would have been merely superfluous, in that section. It is difficult to imagine how an act, "fraudulent" within the meaning of section 3, could be "*bonâ fide*" within the meaning of section 81. But that section seems to me more plainly worded than section 82. The words "really and *bonâ fide*" applied, in section 82, to the past, may be thought not, in point of correct phraseology, applied by it to the future, though the intention of those who framed the act must have extended to the future as well as the past. This, and the circumstance that section 82 provides only for payments by bankrupts to creditors, and payments to bankrupts, while section 81 has, except in point of time, a much larger range, may (whether any stress be or be not laid on the omission of the word "prior" at the conclusion of section 82,) sufficiently account for the words "such payment not being a fraudulent preference of such creditor," being found, in section 82, without ascribing their presence to that construction of section 3 from which I dissent.

I do not, however, think that as to this act (upon the wording of which Lord *Tenterden* is not the only judge that has commented) there is any particularly strong reason for presuming against the superfluosness of words or clauses. I believe that in various parts it contains language both superfluous and incorrect; and supposing therefore the clause that I have just mentioned to be superfluous or unmeaning, except on the supposition that a payment of money by a bankrupt could not be a gift, delivery or transfer of any of his goods or chattels

1844.

  
Ex parte  
SIMPSON.

1844.

Ex parte  
SIMPSON.

within section 3, that circumstance, with regard to this act, would not weigh with me sufficiently to induce me to construe the section in a manner that I should not otherwise do. Nor can I altogether disregard this consideration in coming, as I do, to the conclusion that the 84th section (which also deserves attention with respect to the point now before me) does not affect and ought not to affect the construction of section 3, although containing the words "money" and "payment," as well as the words "goods" and "delivery." Here, indeed, also the more particular and restricted words "money" and "payments" precede, and do not follow the more general and more large words "goods" and "delivery;" and I suppose that no man will contend that the words "wares" and "merchandizes" in this are not merely superfluous. So I apprehend of the words, "offices, fees, annuities, leases," in section 73; and the act contains other instances. It happens indeed frequently in statutes and private instruments, carefully drawn, that there are words of superfluity or surplusage, words that do not add to the meaning, and that the same subjects are described more fully in some and more briefly and concisely in other parts of the same document. If "payment" and "money" had been omitted from section 84, would the law of the country, and the rights of the Queen's subjects, have been at any time different from what they have been, as the statute stands?

The 94th section, I think, also immaterial to the present question, though perhaps the 135th may not be; and on the whole, having, as I believe, mentioned all the sections of the statute 6 Geo. 4, upon which any reasonable argument from context can arise, I conceive that there is nothing in the context of the act to limit the



construction of the words "goods or chattels" in section 3, so as to prevent money from being comprised under them. Such is the view that I take of the construction of the statute, independently of the case of *Bevan v. Nunn*(a). I do not refer to *Carr v. Burdiss*(b), where the question of country bank notes was raised, but not decided, to *Cotton v. James* (c), which has little or no bearing on the matter in hand, or to *Abell v. Daniell*(d), the nature of the question in which case, and the material difference between the 3d section (as to which Lord *Tenterden*, in *Abell v. Daniell*(d) said nothing) and the 73d section, render that case in my judgment not relevant to the question now before me.

In *Bevan v. Nunn*(a), however, an opinion was expressed by the present Lord Chief Justice of the Common Pleas at variance with my view of the 3rd section, and that opinion, as I understand from his Lordship, he retains.

The great attention and deference so justly due to his authority have caused me to consider the point anxiously, and with more than ordinary distrust of my own impressions. My endeavours, however, to bring myself to entertain the same view with his Lordship of the section under consideration have been unsuccessful. And though there may certainly be cases in which it cannot be improper for a judge to act in contradiction to his own opinion, a position in which I considered myself as standing in a case of *Lord Clarendon v. Barham* (e), that was before me as Vice-Chancellor, and in which I am in this Court placed with reference to the 24th section

1844.

Ex parte  
SIMPSON.

(a) 9 Bing. 107.

(d) 1 Mo. &amp; Malk. 371.

(b) 1 C. M. &amp; R. 782.

(e) 1 Y. &amp; C. N. C. 688.

(c) 3 Car. &amp; P. 505.

1844.

Ex parte  
SIMPSON.

of the statute of the 5 & 6 Vict. c. 122, since the Lord Chancellor's decision in *Ex parte Thorold* (a), a decision which, though contrary to my continuing opinion, I follow, I have been unable to think the present one of those. *Bevan v. Nunn* (b) is, as far as the Bar have informed me, single upon this point, and the Lord Chief Justice's opinion that I have mentioned was not necessary for the decision of that case, which turned upon the meaning and effect of the 81st section. On the whole, though sincerely attributing more weight to a legal opinion of the Lord Chief Justice *Tindal*, whether extra-judicial or not extra-judicial, than to any judgment of my own, I do not feel myself warranted in saying that either party to this litigation is not entitled to expect me to act on my own view of the point in question. As to which, agreeing with the Commissioner, Mr. *Fane*, I must decide that an act of bankruptcy was committed by the bankrupt *Smith*, on the 11th of September, 1841, a decision which I have the satisfaction of knowing may, as to the point of law at least, be brought by appeal under the revision of the Lord Chancellor.

(a) 3 M. D. &amp; D. 274.

(b) 9 Bing. 107.

Ex parte THOMAS JONES.—In the matter of THOMAS JONES.—In the matter of WILLIAM JONES; and in the matter of JAMES KNIGHT.

Westminster,  
Nov. 20.

Proceedings  
ordered to be  
delivered to the  
bankrupt's soli-  
citor, to be  
proved in a  
chancery suit,  
the solicitor and  
his agents (who were solicitors of the Court) undertaking to return them in  
a month.

THIS was the petition of the bankrupt, *Thomas Jones*, who was plaintiff in a suit in Chancery, to have the proceedings in these bankruptcies delivered to *C. Harper*,

his agents (who were solicitors of the Court) undertaking to return them in

his solicitor, to be produced at the execution of a commission to examine witnesses, and at the hearing of the cause.

1844.

Ex parte  
JONES.

Mr. *Russell* in support of the petition.

The CHIEF JUDGE.—Is the solicitor a solicitor of this Court ?

Mr. *Russell*.—The London agents are solicitors of this Court.

The CHIEF JUDGE.—The proceedings cannot be allowed to remain out of the custody of the Court for an indefinite period. Mr. *Harper* and his agents, Messrs. *Vincent* and *Sherwood*, undertaking to return the proceedings to the District Court within a month, let them be delivered to Mr. *Harper* to be proved in the suit, and on the like undertaking be delivered to him a week before the hearing and returned to the District Court a week after the hearing.

Ex parte GOULD.—In the matter of GOULD.

THIS was the petition of the bankrupt to have the fiat annulled for want of an act of bankruptcy.

November 20.

Consent by bankrupt to the insertion of the advertisement forthwith held no acquiescence in the validity of the fiat.

Mr. *Swanston* and Mr. *James* in support of the petition.

Mr. *Russell*, for the assignees, took a preliminary objection that the petitioner had (as appeared by the pro-

1844.

Ex parte  
Gould.

ceedings) consented to the bankruptcy being forthwith advertised under 5 & 6 Vict. c. 122, s. 122, and that this amounted to an acquiescence in the validity of the fiat.

The COURT inquired whether the bankrupt had gained any advantage by the advertisement being inserted, and it not appearing that he had obtained any,

The objection was overruled.

April 3, May 1,  
2, and 8; and  
before the Lord  
Chancellor,

June 21, Nov. 6  
and 15th. See  
next case.

The Court of  
Review has  
jurisdiction to  
restrain a party  
committed by it  
for contempt  
from question-  
ing, in an action  
at law, the  
regularity, pro-  
priety or form of  
the order of  
committal.

Ex parte PETER BRUCE TURNER and GEORGE  
HENSMAN.—In the matter of JOHN MARTIN.

THIS was a petition for an injunction to restrain the respondent, *Andrew Van Sandau*, from prosecuting an action of trespass which he had commenced against the petitioners in the Court of Queen's Bench for assault and false imprisonment, the act complained of being the arrest under the order stated in 3 M. D. & D. 551.

Mr. *Swanston* and Mr. *Simon* in support of the petition. [The *Chief Judge*. Had you not better wait till issue joined in the action?] This Court should interfere to protect its suitors and to prevent its order from being called into question. [The *Chief Judge*. What do you say to *Burdett v. Abbot* (a)?] The commitment there was not by a judicial tribunal. In *Frowd v. Lawrence* (b), and the cases there cited, the Court of Chancery has granted injunctions to restrain parties from questioning the validity of its process in other Courts.

(a) 4 East, 1.

(b) 1 Jac. & W. 660.

They also cited *Ex parte Clarke* (a), *Aston v. Heron* (b),  
*In re Weaver* (c), and *Blundell v. Gladstone* (d).

1844.

Ex parte  
TURNER  
and another.

Mr. *Bagshawe* and Mr. *Rolt* appeared for Mr. *Van Sandau*, but

The Court ordered the petition to stand over (without prejudice) until the petitioners should have pleaded and the issue or issues joined in the action should appear.

The petition stood over accordingly, and the defendants pleaded, first, the general issue; second plea, that before the committing of any of the supposed trespasses in the introductory part of the plea mentioned, and after the passing of an act of parliament made and passed in the 6th year of the reign of our Lady the Queen, intituled, "An Act for the amendment of the Law of Bankruptcy," to wit: on, &c., a certain order was duly made by the Court of Review in Bankruptcy of our Lady the Queen, in the matter of one *John Martin*, a bankrupt, and on a certain petition of the now defendants before then preferred and presented to the Court of Review and then pending therein, by which order, after reciting [the plea then proceeded to set out the order] — (e) and the defendants further say, that the said order having been so made as aforesaid, the Honorable Sir *George Rose*, one of the judges of the said Court of Review, afterwards, to wit, on the 19th day of February, 1844, at the request of the now defendants, and according to the

(a) 1 Russ. & My.

(d) 9 Sim. 445

(b) 2 Myl. & K. 394.

(e) See post, 37, note (c).

(c) 3 Myl. & Cr. 441.

1844.

Ex parte  
TURNER  
and another.

course and practice of the said Court of Review made and issued out of the same Court upon the said order his warrant in writing under his hand and seal, bearing date the day and year last aforesaid, and directed to one *William Henry Allen*, tipstaff of the said Court of Review, whereby, after reciting that by the said order of the said Court of Review hereinbefore mentioned and set forth, it was ordered that the now plaintiff should stand committed to the Queen's Prison for his contempt, the said *William Henry Allen* was thereby willed and required forthwith upon the receipt thereof to make diligent search after the body of the now plaintiff, and wheresoever he should find the now plaintiff to arrest and apprehend him and him safely convey to the Queen's Prison, there to remain until the further order of the said Court of Review; also willing and requiring all mayors, sheriffs, justices of the peace, headboroughs, constables and all other her Majesty's loving subjects, to be aiding and assisting the said *William Henry Allen* in the due execution of the premises as they tendered her Majesty's service, and would answer the contrary thereof at their peril, and that warrant should be to them and any of them who should do the same a sufficient warrant as by the said warrant on reference thereto will more fully appear, which warrant they the now defendants according to the course and practice of the said Court of Review afterwards and before the arrest of the now plaintiff as hereinafter mentioned, to wit, on, &c., delivered to the said *William Henry Allen*, who then and from thence until after the execution thereof as hereinafter mentioned was the tipstaff of the said Court of Review, to be executed in due form of law, and requested him to execute the same accordingly, by virtue of which warrant the

said *William Henry Allen*, so being such tipstaff as aforesaid, afterwards, and while the said order and warrant remained in full force, virtue and effect, on the said 20th day of February, in the year last aforesaid in the declaration mentioned, and within the jurisdiction of the said Court of Review, to wit, at, &c., and according to the course and practice of the said Court of Review, took and arrested the now plaintiff.

1844.  
Ex parte  
TURNER  
and another.

The plaintiff joined issue on the first plea and demurred to the second.

The petition was then again ordered to be placed in the paper and came on to be heard on this day.

May 1.

Mr. *Swanston*, Mr. *James Russell*, Mr. Serjeant *Manning*, and Mr. *Simon* in support of the petition.

There can be no doubt that this Court has the power of granting an injunction, for by the 1 & 2 Will. 4, c. 56, s. 2, it has all the power which the Lord Chancellor had when sitting in bankruptcy; and the jurisdiction of the Lord Chancellor is established by many authorities, such as *Ex parte Grant* (a), *Ex parte Cutton* (b), *Ex parte Leigh* (c) and *Ex parte Hornby* (d). In *Kirkpatrick v. Dennett* (e) the Vice-Chancellor allowed a demurrer to a bill in Chancery for an injunction, saying that the proper and familiar course was by petition in the bankruptcy.

Next, the Court having the jurisdiction, this is a most fit case for its exercise. The Court of Chancery always in such a case interferes by injunction: *Bailey v. Devereux* (f), *May v. Hook* (g), *Frowd v. Lawrence* (h),

(a) Buck, 92.

(b) 1 G. & J. 317.

(c) 2 G. & J. 332.

(d) Mont. & B. 1.

(e) 1 Si. & St. 408.

(f) 1 Ver. 259.

(g) 1 Dick. 619.

(h) 1 J. & W. 665.

1844.

Ex parte  
Turner  
and another.

*Ashton v. Heron*, (a), *Chalie v. Pickering* (b), *Andrew v. Walter* (c), *Ex parte Clarke* (d).

In *Ex parte Cowan* (e) a commission had been superseded under which the estate had been mismanaged, and a prohibition was sought to be obtained in the Court of King's Bench to restrain further proceedings on an order of the Lord Chancellor sitting in bankruptcy, on the grounds that the jurisdiction was at an end by the *superseas*, and that the order directed a payment in the nature of damages and by parties other than the assignees, but the Court of King's Bench held that there was no want of jurisdiction in the Lord Chancellor to make the order complained of, saying at the same time, that the judges wished not to be understood as giving any sanction to authority of the Court to grant the prohibition, and adding, "If ever the question shall arise, the Court, whose assistance may be invoked to correct an excess of jurisdiction in another, will without doubt take care not to exceed its own."

In *Brass Crosby's case* (f) Mr. Justice Blackstone said, "All courts, by which I mean to include the two Houses of Parliament and the Courts of Westminster Hall, can have no controul in matters of contempt. The adjudication of contempts, and the punishment thereof in any manner, belongs exclusively and without interfering to each respective Court. Infinite confusion and disorder would follow, if Courts could by writ of *habeas corpus* examine and determine the contempts of others. This power to commit results from the first prin-

(a) 2 Myl. & K. 391.

(b) Referred to in *Chalie v. Pickering*, 1 Keen, 751.

(c) 1 Russ. & M. 563; and see *Philips v. Worth*, 2 R. & M. 638; and *Bricknell v. Stamford*, 1 Bea. 368.

(d) 3 B. & Ald. 123.

(e) 1 Keen, 751.

(f) 3 Wils. 204.



ciples of justice; for if they have power to decide, they ought to have power to punish. No other Court shall scan the judgment of a superior Court, or the principal seat of justice. As I said before, it would occasion the utmost confusion, if every Court of this Hall should have power to examine the commitments of the other Courts of the Hall for contempts, so that the judgment and commitment of each respective Court as to contempts must be final, and without controul. It is a confidence that may with perfect safety and security be reposed in the judges and the Houses of Parliament.

1844.  
  
 Ex parte  
 TURNER  
 and another.

Mr. *Bagshawe* and Mr. *Rolt* for the respondent. The Court of Review has no jurisdiction to grant an injunction. Even before the transfer of the jurisdiction in bankruptcy to that Court, Lord *Eldon*, in *Ex parte Glossop (a)*, dismissed a petition, praying that the bank-

(a) 2 G. & J. 208.

The following is the note of the case from the Minute Book.

*Glossop*—*Kemp*.

Lord Chancellor,  
 16 August, 1825.

(To restrain bkrt. from trying validity of com-  
 by an action after 11 years—petg. assese.

*Hart* for, *Trol-*  
*lope*, same; *Solor*.  
*Genl.* for bkrt.,  
*Horne* for bkrt.,  
*Montagu* for same.

*Exp. Grant, Esp.*  
*Richardson, Flower*  
*—Herbert*, 2 Ves.  
 326.

L. C. As to juron.  
*Exp. Grant* and  
*Exp. Richardson*  
 were under dif-  
 ferent circum-  
 stances. These  
 were cases of ex-

1844.  
 ~~~~~  
 Ex parte  
 TURNER  
 and another.

rupt might be restrained from proceeding at law to dispute the commission. His Lordship said he was satisfied the only remedy was by bill, although *Ex parte Grant, Kirkpatrick v. Dennett* and *Ex parte Cutten*, were all cited to him. And in *Thorpe v. Goodall*(a) he expressly states the power to belong to the Court of Chancery. In *Green v. Elgie* an application was made to Sir J. Cross to stay the proceedings; but he declined to interfere on the ground that he had no jurisdiction. With respect to *Ex parte Leigh*, cited on the other side, it is to be remarked that *Ex parte Glossop* was not referred to in it. Supposing the Court to have jurisdiction, it ought not to be exercised here; *Burdett v. Abbot*(b), case of *The Sheriff of Middlesex*(c); *Stockdale v. Hansard*(d), and *Green v. Elgie*(e).

Mr. Swanston in reply. The dictum attributed to Lord Eldon on the report of *Ex parte Glossop* cannot be accurately represented. [The *Chief Judge*. The words

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ception to rule of  
 proceeding by bill  
 not by petition.

[*Flower and Herbert* applicable to  
*Townsend's case*.]

The question here is, is there positive delay and acquiescence? It is now ten years. Surrendering and passing examination—petition to expunge—purchasing dividends, and other instances of interference as he has done, is material.

Lord Chancellor denied with costs, without prejudice to filing bill, or to what may be done to stay execution, or to on bill filed. Will read affidavits as to costs, if desired, to ascertain irrelevance, those affidavits which are in answer.

If you (petr.) file bill and succeed, I will give you costs.

(a) 17 Ves. 393.

(d) 9 A. & E. 1.

(b) 14 East, 1.

(e) 8 Jurist, 187.

(c) 11 A. & E. 273.

seem hardly like Lord *Eldon's* style. Has any judge expressed an opinion on *Ex parte Glossop* as reported? Lord *Brougham* has; in *Ex parte Hornby*, saying that it seemed an exception to the general rule. [The *Chief Judge*. There would be nothing extraordinary in the decision in *Ex parte Glossop*, if considered to proceed on the ground that the case was not clear enough to be decided, except upon a bill. In more than one case clearly within the jurisdiction in bankruptcy, Lord *Eldon* ordered the matter to stand over, with leave to file a bill.] That was his Lordship's habit in difficult cases, in order that the parties might not be without an appeal from his decision. The recent case of *Green v. Elgie (a)* has been referred to on the other side to show that the commitment was wrong in this case. I refer to it also to show that it is not safe for the Court here to entrust the question of its jurisdiction to the decision of a court of law. The case of *Green v. Elgie* is contrary to the doctrines laid down and acted upon in *Burdett v. Abbot*. The order which the Court of Queen's Bench held to be irregular had been already decided to be correct by Lord Chancellor *Cottenham (b)*.

1844.  
  
*Ex parte*  
*TURNER*  
 and another.

The CHIEF JUDGE.—The present petition to stay proceedings at law, taken by Mr. *Van Sandau*, arose thus: In February, 1844, an order was made by Sir *G. Rose* in this bankruptcy to the following effect. [His Honor read the order (c).] It alleges the publication of a libel

(a) 8 Jurist, 187.

(b) 1 M. D. & De G. 464.

(c) In Bankruptcy, Court of Review.

Saturday the fourth day of February,  
 one thousand eight hundred and  
 forty-four.

In the matter of *John Martin*, a bankrupt.

Whereas *Peter Bruce Turner* and *George Hensman*, of No. 8, Basing

1844.

Ex parte  
TURNER  
and another.

of the most grave and serious kind; perhaps one of the worst that it ever occurred to me to see.

Lane, in the city of London, gentlemen, solicitors and attorneys on the roll of this Court, and copartners, did on the nineteenth day of January last prefer unto this Court their petition in the above matter, stating (amongst other things) that *William Mungo Glaister*, one of the assignees of the said bankrupt, in the month of February, one thousand eight hundred and forty-three, presented his petition to this Honorable Court in the matter of the above bankruptcy, praying for the retaxation of the several bills of costs of the said petitioners and *Richard Cumming*, the joint solicitors to the fiat issued against the said *John Martin*; that upon the hearing of the said petition a motion was made to this Court on the part of *Joseph Lambert* of Leeds, in the county of York, woollen manufacturer, the co-assignee of the said *William Mungo Glaister*, to the effect set out in the said petition; that the said petitioners having been served with the said notice of motion, appeared upon the said notice of motion as well as upon the said petition; that this Court, on the first day of March, one thousand eight hundred and forty-three, upon reading the affidavits filed on the matter of the said petition and motion, and after hearing counsel for the said *William Mungo Glaister* and for the said petitioners, as well as for the said *Joseph Lambert* and *Richard Cumming*, made an order upon the said petition and motion (among other things) for the retaxation of the several bills of costs under the said fiat; that after the said retaxation was completed (that is to say) on the twenty-first day of November last, the said *William Mungo Glaister* presented his further petition to this Court, praying for its further order and direction in the premises, which said petition and the said motion, so far as it was reserved by the said order, came on for hearing on the eleventh, thirteenth and fourteenth days of December last respectively, before this Court, when, after hearing the counsel of all the parties to the said petition and motion, this Court took time to look into the voluminous affidavits filed in the matter in the said petition and motion, and to consider what justice required should be done in the premises; that on the twenty-first day of December last the judgment of this Court in the premises was solemnly pronounced; that although the minutes of the said order had been given out to the parties respectively entitled to the same, and although meetings had been had before the registrar of this Court for the purpose of settling the same, they had not been finally settled, and the order of this Court in the premises had not been finally drawn up; that on the eighth day of January instant, while the said petitioner, *Peter Bruce Turner* and the said *Andrew Van Sandau* were attending at the office of the registrar of this Court upon the said minutes, the said *Andrew Van Sandau* handed to the registrar, and also while in the act of settling the said minutes of the said order, in the presence of the said registrar and of the said petitioner, *Peter Bruce Turner*, and *William Cos*,

After reciting the petition, the mandatory part of the order runs thus: "This Court doth order that the said

1844.

  
Ex parte  
TURNER  
and another.

solicitor for *William Mungo Glaister* (the petitioner in such former petition), and of *Thomas Clarke*, one of the said petitioner's clerks, the said *Andrew Van Sandau* handed to *Frederick Turner*, of King Street, Cheapside, in the city of London, attorney and solicitor, who happened to come into the said office on that occasion on professional business with the said registrar, a printed circular or handbill indorsed in the words following: "*Re John Martin*, a bankrupt, *Ex parte William Mungo Glaister*. A statement of extraordinary frauds practised in this bankruptcy, showing how such frauds are now facilitated and encouraged, and how they might be prevented. By *Andrew Van Sandau*, Attorney at Law. London: Printed by *L. Houghton* and Co. 30, Poultry." That the said circular or handbill was headed in the first page with the words following: "A short statement of frauds, by which the public are robbed under fiats in bankruptcy, and by which the profession of the law is brought into disrepute;" that the said circular or handbill contained false, scandalous and defamatory matter of and concerning this Court, and the proceedings and judgment and order of this Court in the above mentioned matter, as well as of and concerning the said petitioners in reference to the matters connected with the petition and motion so as aforesaid adjudicated upon by this Court; that the said printed circular or handbill so delivered by the said *Andrew Van Sandau* to the said *Frederick Turner* was in the same words and figures as the printed paper marked A., annexed as a schedule to the said petition; that the said *Andrew Van Sandau* composed the manuscript from which the said printed paper was printed, and delivered the said manuscript to *Lucas Houghton* for the purpose of being printed; that accordingly the said *Lucas Houghton* printed five hundred copies from the manuscript so delivered to him by the said *Andrew Van Sandau*, which five hundred copies respectively were in the same words and figures with the said printed paper annexed to the said petition, such printed paper being one of the copies so printed; that the said *Lucas Houghton* delivered the said five hundred copies of the said circular or handbill to the said *Andrew Van Sandau*, who had caused the same to be printed with a view to distribute and circulate the same, and thereby to vilify and bring into contempt this Court, and the proceedings, order and judgment of this Court in the said matter, as well as to injure and vilify the said petitioners in the matter aforesaid, who are attorneys or solicitors of this Court; that since the said five hundred copies of the said manuscript composition of the said *Andrew Van Sandau* were so as aforesaid printed and delivered to the said *Andrew Van Sandau*, very many copies thereof had been circulated and distributed among commercial men and solicitors, and more especially among the clients and friends of the said petitioners,

1844.

Ex parte  
TURNER  
and another.

*Andrew Van Sandau* do stand committed to the custody of the keeper of the Queen's Prison until the further

both in London and its neighbourhood, and in Yorkshire and Lancashire, where the said petitioners have extensive connections, and the said copies had been so distributed among the persons sforesaid and in the places aforesaid by the said *Andrew Van Sandau*; that the said *Andrew Van Sandau* also on the seventeenth day of January instant, and during the sitting of this Court, in open Court and in the presence of the Court and also of the said *Peter Bruce Turner* (who was then and there attending for the purpose of hearing and arguing the amended minutes of the order of the Court in the matter of the said petition of the said *William Munge Glaister*, as set down in the cause paper of that day at the instance of the said *Andrew Van Sandau*), with his the said *Andrew Van Sandau's* own hand delivered copies of the said printed circular or handbill to Mr. *William Henry Cotterill*, solicitor to Mr. *Robert Hooper Tolcher*, and to other persons then attending in the said Court, to the great scandal and contempt of this Court and its proceedings, and to the great detriment of the said petitioner's suitors and solicitors thereof in their professional character and reputation; that the said *Andrew Van Sandau* had sent or delivered copies of the said printed paper, handbill or circular, being some of the copies which he so received from the said *Lucas Houghton*, to the Commissioners of the Court of Bankruptcy, and the deputy registrars, official assignees and messengers of the said Court; that the said *Andrew Van Sandau* had still in his possession a number of the said printed papers, circulars or handbills, and he meant to distribute and circulate the same; that the said *Andrew Van Sandau* in what he had so done had committed a high contempt of this Court; that the said *Andrew Van Sandau* had been duly admitted and enrolled as an attorney or solicitor of her Majesty's Court of Bankruptcy, and then was an attorney or solicitor on the roll of the said Court, and practised in the said Court as an attorney or solicitor thereof; and the said petition prayed that the said *Andrew Van Sandau* might immediately stand committed to the Queen's Prison for his high contempt of this Court, and that a warrant might issue for that purpose, and that the said *Andrew Van Sandau* might be ordered to pay to the said petitioners their costs, charges and expenses of that application and incident thereto; and that the said *Andrew Van Sandau* might be removed from off the roll of attorneys or solicitors of her Majesty's Court of Bankruptcy: And whereas the schedule to the said petition was in the words and figures following, that is to say, [*here follows a copy of the printed paper or handbill*]: Now upon hearing the said petition and schedule, and the affidavits filed in support thereof and in opposition thereto read, and what was alleged by Mr. *Swanston*, Mr. *Thesiger*, Mr. *Russell* and Mr. *Simon* of counsel for the said petitioners, and by Mr. *Bagshawe*, Mr. *Rolt* and Mr. *Bovill* of counsel for the respondent, *Andrew Van Sandau*: This Court doth

order of this Court for his contempt of this Court in writing, printing and publishing the aforesaid printed paper so set out as aforesaid in the schedule to the said petition, and that a warrant do forthwith issue for that purpose." From this order Mr. *Van Sandau* has never appealed; and I suppose that I ought to consider it regular and valid. Under it Mr. *Van Sandau* was arrested, and was for a short time in custody. He applied to be discharged, and was discharged, on making an apology, which was deemed sufficient, and on the terms of the payment of costs. He did not apply to any other judge or Court, either by way of *habeas corpus* or otherwise. But he brought an action to recover damages for the arrest and imprisonment.

When the petition first came before me, the defendants at law had not pleaded, and this Court ordered it to stand over, without prejudice to any question, till after issue joined, in order that this Court might see what questions of law or fact or both the parties meant to raise. The defendants have now pleaded at law. The pleas are two. 1st. The general issue: 2ndly. A justification, on the ground of the order of committal. On the first plea the plaintiff joined issue; and to the second, he has

order, that the said *Andrew Van Sandau* do stand committed to the custody of the keeper of the Queen's Prison until the further order of this Court for his contempt of this Court in writing, printing and publishing the aforesaid printed paper so set out as aforesaid in the schedule to the said petition, and that a warrant do forthwith issue for that purpose: And it is ordered that the said respondent do pay to the said petitioners their costs, and charges, and expenses of and occasioned by this application, and of the said order, and of carrying the same into execution, and incidental thereto respectively: And it is hereby referred to *William Vizard*, Esq., an officer of this Court, to tax such costs, charges and expenses between the parties, if they differ about the same, the payment of the said costs nevertheless to be suspended until after the execution of this order.

By the Court.

1844.  
Ex parte  
TURNER  
and another.

1844.

Ex parte  
TURNER  
and another.

demurred. In this state of things the petition has now to be disposed of, and although the matter is one of importance, yet, as it presses in point of time, and ought, I suppose, to be soon taken before the Lord Chancellor, if at all, and as I have had an opportunity of looking at the books referred to, it appears to me right not to delay declaring my opinion. I have read what was said in *Brass Crosby's* case (a), *Burdett v. Abbot* (b), *Stockdale v. Hansard* (c), the case of *The Sheriff of Middlesex* (d). I add to these authorities Lord Chief Justice *Wilmot's* observations in *Almon's* case (e).

I am of opinion that I am bound to consider the cases of *Bailey v. Devereux* (f), *May v. Hook* (g), *Frowd v. Lawrence* (h), *Green v. Wilkins* (i), and *Chalie v. Pickering* (k), as correctly decided, and as binding authorities, nor am I aware of any ground for saying that the principles laid down in them, if correctly laid down, are peculiar to the Court of Chancery. I am of opinion that the Court of Review (which is a Court of Equity and of Law) and its orders and process, are equally with the Court of Chancery, within the reasons and principles of those cases, and that I ought to apply them to the consideration of the case now before me.

By an act of the legislature (l), the judges of this Court, or any three of them, were to form a Court of Review, and were invested with power, jurisdiction and authority, to hear and determine and allow all such matters in bankruptcy as at the time of passing the act usually were

(a) 3 Wils. 204.

(b) 14 East, 1.

(c) 9 Ad. &amp; El. 1.

(d) 11 Ad. &amp; El. 273.

(e) *Wilmot's Opinions and Judgments*, 265.

(f) 1 Vern. 269, and 1 J. &amp; W. 660, n.

(g) 1 Dick. 619, and 1 J. &amp; W. 663, n.

(h) 1 J. &amp; W. 665.

(i) Mentioned in *Aston v. Heron*, 2 M. & K. 391.

(k) 1 Keen, 751.

(l) 1 &amp; 2 Will. 4, c. 56, s. 2.



or lawfully might be brought by petition or otherwise before the Lord Chancellor. And these words must now apply to the Court of Review, when constituted of a single judge (a).

1844.  
  
 Ex parte  
 TURNER  
 and another.

I do not conceive, supposing this Court to have power to commit for contempt, supposing it to have made an order of committal, showing the party committed to have been guilty of a contempt of Court, and on that ground to have been committed, that the question of the mere propriety of the form of the order ought to be submitted to any other jurisdiction. It is plain that Mr. *Van Sandau* means to raise the question of the propriety and regularity of the order beyond the extent which I have mentioned.

On a subsequent day the Chief Judge made the following remarks :

The CHIEF JUDGE.—When this petition was first brought before the Court, the petitioners, the defendants in the action to which it relates, had not pleaded at law; and as the matter then stood, especially in point of evidence, I thought it better to decline interfering with the legal proceedings at that time; but I meant to reserve the question, whether, having regard to the evidence to be adduced upon the petition, and to the nature of the pleadings in the action, when completed, and of the issue or issues, whether of fact or law, or both, which should be joined in it, this Court would or would not interpose against the progress of the action beyond a certain stage, wholly or partially, by way of injunction; that is, of course, by way of order, analogous to an injunction; for that there were and are cases, in which the Lord

(a) 5 & 6 Vict. c. 122, s. 64.

1844.

Ex parte  
TURNER  
and another.

Chancellor, sitting in bankruptcy, could—and in which the Court of Review can—make orders analogous to injunctions,—orders having substantially the same effect, there is not the least doubt.

The pleadings in the action are now completed. They are in the form in which the parties respectively have thought fit to shape them. This Court, not having interfered in the matter, the issues of fact and law, which have been joined in the action, are the issues which they must be taken respectively to have wished to be joined in the action. Now, though the petitioners, having come to this Court, as they did in the first instance, before pleading, cannot of course be blamed for having pleaded, it is a different question whether, consistently with truth and propriety, their pleas, or one of them, might have been framed in a manner more advantageous for the petitioners—a question, upon which I do not intimate, nor indeed have I formed any opinion.

The Court may possibly have acted erroneously in not restraining the action before plea pleaded. If it did, it ought to prevent, as far as possible, the petitioners from being prejudiced by the mistake. However that may be, the Court must now determine whether to interpose against the continuance of the legal proceedings, and if so, to what extent, and in what manner; with reference to which question, it may be observed, that the action is not an action on the case; it is one of trespass merely. The only trespass, or alleged trespass, upon which the action was brought,—the only trespass, or alleged trespass, capable of supporting it, is the caption of Mr. *Van Sandau* by an officer of this Court, under process of this Court, issued under an order of committal, made by this Court.

I say by this Court, for it is plain and clear that the order of committal was an order, to all intents and purposes, of the Court of Review, though a single judge (Sir *George Rose*) was then sitting in the Court and constituting it.

1844.  
  
 Ex parte  
 TURNER  
 and another.

It is admitted, that there was not any excess or oppressive, or vexatious or offensive conduct on the part of the officer. He is not a defendant in the action. The defendants are the parties who presented the petition to this Court, upon which the order of committal was made. By that petition they alleged, and truly, that Mr. *Van Sandau* had caused to be printed and published a certain document commenting, in a particular manner, upon some proceedings in this Court, in which they were concerned, and reflecting, in a particular manner, upon them; the petition, submitting that, by doing this, Mr. *Van Sandau* had been guilty of a contempt of this Court, prayed his committal.

Mr. *Van Sandau* admitted the publication, and this Court (then constituted of Sir *George Rose*), after a full hearing of Mr. *Van Sandau*, by himself, or his counsel or both, upon the petition, made an order upon it for his committal.

The petitioners, having obtained this order, prosecuted it by causing it to be drawn up, by causing process of this Court for the caption of Mr. *Van Sandau* to be issued under the order, and by placing that process in the hands of the officer already mentioned, with a view to its execution, and it was executed, as has already been stated. This, I repeat, was the only trespass (if any) committed by the petitioners, the defendants at law, or either of them, to which the action did or does relate.

It is therefore manifest, that if the process was law-

1844.

Ex parte  
TURNER  
and another.

fully, duly and regularly issued, and lawfully, duly and regularly executed, the action was brought without any ground or foundation whatever. It was, in fact, brought for the single purpose of trying whether the process was lawfully, duly and regularly issued, and lawfully, duly and regularly executed, and if it was not, of obtaining damages for the caption. The order of committal may or may not have been erroneous. It has not, hitherto, been appealed from, nor has the petition, on which it was made, been hitherto reheard, or sought to be reheard, as far as I am aware; nor have I heard anything to satisfy me, that, if the order was erroneous, that is a circumstance affecting the lawfulness or regularity of the process under it. The order was an order of this Court, made in a matter of bankruptcy. The order stood when the process was issued, when the process was executed, and when the action was commenced, and still stands.

Considering then these circumstances, including the fact that the present petition was presented and brought before this Court previously to any plea in the action, and therefore, of course, previously to the demurrer, what is the course which this Court ought to take?

Upon the undisputed facts, as they now appear, it seems to me very plain that, had the order of committal been made by the Court of Chancery in a suit or proceeding in that jurisdiction, and the process under the order accordingly been process of that jurisdiction (all other circumstances of the case being as they are), it would have been the duty of the Court of Chancery, or competent for that Court, in the due discharge of its proper functions, to restrain the action wholly or partially upon such terms and with such directions as might appear most to conduce to justice. At least, if the case

of *Frowd v. Lawrence* (a) was correctly decided, that would, I apprehend, certainly be so. That case, though decided by Lord *Eldon*, I have heard questioned; but I think myself not at liberty to act judicially upon any notion that such a decision, pronounced by such a judge, in conformity with earlier cases, and followed in later cases, was not correct.

1844.  
  
 Ex parte  
 TURNER  
 and another.

It may be said, however, and it has been said, that it does not of necessity follow from these authorities, or from the principle on which they proceeded, that, if in Lord *Eldon's* time a point similar or analogous to that raised and determined in *Frowd v. Lawrence* had arisen before the Lord Chancellor in bankruptcy, it would have been correct or within his functions, in that jurisdiction, to take the same or a similar course. It is not clear to me that this argument is without foundation. But looking at the nature, description and extent of the Lord Chancellor's jurisdiction in bankruptcy, as it existed in the times of Lord *Hardwick*, Lord *Thurlow*, Lord *Rosslyn*, and Lord *Eldon* (without forgetting the parliamentary origin of the jurisdiction at a period later than the 15th century), the better opinion appears to me to be that, if the judicial authority exercised in *Frowd v. Lawrence* was an authority, incident and belonging to the Court of Chancery, there is not any sufficient reason for saying that it was not incident and belonging likewise to the jurisdiction in bankruptcy, then vested in the Lord Chancellor—a jurisdiction both equitable and legal. The absence, at that time, of an appeal from that jurisdiction to the House of Lords, whether affecting or not affecting the discretion of the judge, as to the manner of

(a) 1 J. & W. 665.

1844.  
Ex parte  
TURNER  
and another.

exercising its functions, does not seem to me to affect the question, what its functions were.

That which in this respect it was competent and correct for the Lord Chancellor sitting in bankruptcy to do, immediately before the establishment of the Court of Review, it must, in my judgment, now be competent and correct for the Court of Review to do.

Of course these two points are of such a kind, that my opinion upon them is not conclusive, and, but for the consideration that it may be the subject of immediate appeal to the Lord Chancellor, I should probably feel more hesitation and disinclination than I do to decide, as I now decide, that this petition ought not, on the ground of want of jurisdiction, to be dismissed.

To a certain extent, therefore, at least, I cannot, in my opinion, properly refuse to interfere with the further progress of the action. But, recollecting that I am not sitting in the Court of Chancery, there are three points, which, if Mr. *Van Sandau* shall wish to try at law, I think that he ought to be at liberty to try at law. Whether I consider them clear or not clear of difficulty, open or not open to reasonable doubts, I do not say.

They are these :

1. Whether the Court of Review has power to commit for a contempt—I say “the Court of Review”—because, as I have before stated, it is manifest that every act of Sir *George Rose* in this matter was an act of the Court of Review duly and sufficiently constituted of a single judge.

2. Whether it appears, on the face of the order, that Mr. *Van Sandau* was ordered to be committed on the ground that, in the opinion of the Court of Review, an

act, considered by it to be a contempt of the Court of Review, had been done by him.

3. Whether it appears, on the face of the order, that the committal ordered was on the ground of an act done, which, by law, did not form or amount to a contempt of the Court of Review.

As I am not, at present, prepared to decide these three questions in Mr. *Van Sandau's* favour, and as he does not, I suppose, mean to concede either of them, he will, I conclude, desire to try them at law, and if he can make the pending action or any other available for the purpose, I shall leave him at liberty to do so. I think that he ought, for the present at least, to be restrained from making the existing action, so far as he can exercise any controul over the matter, available for any other purpose.

What course it may be fit to take, when I shall have learned the opinion of the Court of Queen's Bench, or some other Court of Law, upon these three questions, or when I shall be, by any means, in a condition to act judicially, with satisfaction to myself, upon any particular view of them, is a matter for future consideration. The order that I make is this. [The *Chief Judge* stated the substance of the order, of which a copy will be found below.]

It may be said, indeed it has been stated at the bar, that the Court of Queen's Bench, upon the argument of the demurrer, howsoever shaped or otherwise, in the action, may take and decide upon legal points of substance, not argued by either of the parties to the action, or their counsel.

Of course that may happen. The Court of Queen's Bench will, and necessarily must, as to matters of substance, decide upon its own view of the law, applicable

1844.

Ex parte  
TURNER  
and another.

1844.

Ex parte  
TURNER  
and another.

to the subject-matter of every record that may be brought before it, whatever may be conceded or argued, or omitted to be argued by counsel. But this Court will have the advantage of knowing the decision, and the grounds of the decision of the Court of Queen's Bench; and it is possible, I think I may say probable, that if the learned judges shall be informed of what has taken place, and is now taking place here, they will not decline to express an opinion upon the three questions that I have mentioned, though they may not deem a decision of them necessary for any purpose of that Court merely. I will consider whether it may not be fit for me to make a communication to their Lordships on the subject.

If the pending proceedings at law should fail to produce an expression of opinion from the learned judges of the Court of Queen's Bench upon these three questions, there may possibly be some difficulty as to the course that I ought to take. If any difficulty shall arise, I must deal with it as well as I can.

Before concluding, I may add the remark (however obvious) that it is very possible for a case to arise in a Court of Equity, in the Court of Chancery, in which a plaintiff there, being defendant in an action, may, as to certain legal grounds, available at law against him in the action, not be entitled to an injunction, but may as to other legal grounds, so available, be entitled to an injunction.

A Court of Equity is bound, in such circumstances, to assist the plaintiff in equity, defendant at law, and must have the means, must have the power of doing so without committing the injustice of restraining his adversary wholly from legal proceedings. I am of course supposing, not a case of evidence, which the parties, or one of



them, may be able, if disposed, to keep from the knowledge of the Court of Law, but a case where there are patent upon the record in an action, several distinct grounds, upon either of which the plaintiff at law may at law be entitled to judgment, but upon one of which it is not, and on the other of which it is, contrary to equity that he should succeed.

It cannot be a reason, in such circumstances, for refusing equitable interference, that the Court of Law may consider itself bound to take, in favour of the plaintiff at law, the point, which it is contrary to equity for him to raise, and from which it is contrary to equity that he should derive advantage or benefit.

As the Court of Chancery, in such a state of things, would certainly find a way of dealing effectually with the difficulty, and yet avoiding injustice on either side; so in the present case, I do not feel any apprehension of having the course of justice impeded effectually, or embarrassed substantially, by any mode of dealing with Mr. *Van Sandau's* demurrer, or his action, which the Court of Queen's Bench may consider legally right.

The petitioners, in the possible case of the plaintiff at law obtaining judgment at law, upon a ground which this Court considers him not entitled to raise at law, or from which this Court does not consider him entitled to take any benefit in the action, will have time before execution, if so disposed, to ask this Court for its interposition. This Court will be open in that or any other event to any relevant application on either side.

If the petitioners think fit to consent to have their petition dismissed, I shall dismiss it, certainly without costs. If they do not so consent, the only order, I re-

1844.

Ex parte  
TURNER  
and another.

1844.  
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 Ex parte  
 TURNER  
 and another.

peat, that can, I think, at present be properly made is that which I have already stated.

The order, as drawn up, was made to bear the date of 8th May, and was thus :

In Bankruptcy, Court of Review.

Wednesday, the 8th of May, 1844.

In the matter of *John Martin*, a Bankrupt.

Whereas *Peter Bruce Turner*, &c. did, on the 27th day of March last, prefer unto this Court their petition in the above matter, praying, &c. And whereas upon hearing, on Wednesday, the 3d day of April last, the said petition, and the affidavits filed in support thereof and in opposition thereto read, and what was alleged by Mr. *Swanston*, Mr. *Russell* and Mr. *Simon* of counsel for the said petitioners, and by Mr. *Bagshawe* and Mr. *Rolt* of counsel for the respondent *Andrew Van Sandau*, this Court did order the matters of the said petition to stand over, without prejudice to any question, till after such issue or issues of fact, if any, as should be joined in the said action, should have been joined, or till further order ; and this Court gave liberty to the parties to apply to this Court touching the matters of the said petition. And whereas afterwards an issue of fact was joined in such action upon a plea of not guilty, and a demurrer was delivered by the said *Andrew Van Sandau* to a plea of justification in such action, and there was joinder in demurrer thereupon, and the said petition was thereupon ordered to stand in the paper to be further heard : Now upon hearing, on Wednesday the 1st, and Thursday the 2d days of May instant, and this day, the said petition and the affidavits filed in support thereof and in opposition thereto read, and what was alleged by Mr. *Swan-*

ston, Mr. Serjeant *Manning*, Mr. *Russell* and Mr. *Simon* of counsel for the said petitioner, and by Mr. *Bagshawe* and Mr. *Rolt* of counsel for the said respondent *Andrew Van Sandau*,—*This Court doth order*, that the said parties, petitioners and respondent, and their counsel, attornies and agents respectively, be and they are hereby restrained from all further proceedings in the said action at law till further order, subject only and except as hereinafter mentioned. But the said *Andrew Van Sandau* is to be at liberty to obtain, and the said petitioners are to consent to his obtaining, on or before Tuesday the fourth day of June next, a rule or order in such action for amending his said demurrer. And the said *Andrew Van Sandau* is to be at liberty to amend the same and the causes of demurrer thereby assigned, confining the causes of demurrer to the points which he is hereby permitted to raise in the said action as hereinafter mentioned, and the said parties respectively, their counsel, attornies and agents, are to be at liberty to proceed to argument, judgment and execution upon the said demurrer, when amended as aforesaid, so far as the rules of law will allow. And the said *Andrew Van Sandau*, his counsel, attornies and agents, are to be at liberty upon the argument, and for the purposes of the said demurrer when so amended, to contend that the Court of Review has not and had not in February, 1844, jurisdiction, power or authority, to commit for a contempt of such Court, and that it does not appear on the face of such order as stated in the said plea of justification that the said *Andrew Van Sandau* was thereby ordered to be committed, on the ground that in the judgment or opinion of the Court of Review, an act or acts, considered by the Court of Review to be a contempt of the said


1844.

Ex parte  
TURNER  
and another.

1844.

Ex parte  
TURNER  
and another.

Court, had been done by him. And also to contend that it appears on the face of such order that the committal thereby ordered was on the ground of an act or acts done by the said *Andrew Van Sandau*, which by law did not form or amount to a contempt of the Court of Review. But the said *Andrew Van Sandau*, his counsel, attornies and agents, are not further or otherwise on the argument, or for any purpose of such demurrer or amended demurrer, to dispute or question the validity or propriety of the said order, and are, on the argument, and for the purposes of the said demurrer when amended as aforesaid, and for the purposes of the judgment thereon, to admit the validity and propriety, regularity, formality and sufficiency of such order, in all other respects and particulars, than the points which, so far as they shall be open and available at law on the said demurrer, when amended as aforesaid, liberty is hereby given to raise at law against the validity of the said order as aforesaid; and also to admit that, supposing the said order to have been legal, valid and regular, the warrant, caption and arrest thereunder, were also legal, valid and regular; but this order is to be without prejudice to any question which may be made or raised in this Court as to the validity, propriety or regularity of such order, warrant, arrest and caption, or either of them, or as to damages, or as to the propriety of trying the said issue of fact hereafter. And let the said petition in all other respects stand over; and the said parties respectively are to be at liberty to apply to this Court as to costs or otherwise touching any of the matters aforesaid as they may be advised.



**Ex parte ANDREW VAN SANDAU.**—In the matter  
of MARTIN.

**THE** draft of a special case on appeal from the foregoing order of the Court of Review as well as from the original order of committal, and all the subsequent orders in the matter, was submitted to the Chief Judge, who wished it to be submitted to Sir *G. Rose* as to so much of it as related to matter of appeal from Sir *G. Rose*. Upon Sir *G. Rose's* intimating a doubt whether the circumstances of the case constituted a subject of appeal by way of special case, and adding, that perhaps a better course would be to apply to the Lord Chancellor to hear the case on a petition of appeal, Mr. *Van Sandau* moved *ex parte* that he might be heard on a petition of appeal without a special case, whereupon the Lord Chancellor ordered that the petition of appeal should be received and laid before his Lordship to be answered for an early day, and that a copy of that order should be served on the respondents, who were to be at liberty to apply to discharge the same if they should think fit.

Mr. *Swanston* and Mr. *Simon* on this day moved to discharge the order.

A commitment for contempt is not a proper subject for

1844.

*Before the  
Lord Chancellor,  
June 12 and 21,  
November 6, 7,  
and 15.*

1. *Quere*, whether a commitment by the Court of Review for contempt can be the subject of appeal.

2. An appeal from a series of orders of the Court of Review permitted, under the circumstances, to be by way of petition.

3. An apology and petition to be discharged from custody and other proceedings by a party committed for contempt under the order of commitment and the consequential orders, *held* not to preclude the party committed from disputing the validity of the commitment.

4. An order of commitment should contain an express adjudication that a contempt has been committed.

5. Where such an order recites the petition on which it is made and refers to a printed paper as being set out in the schedule to the petition and then recites that the schedule to the petition is in the words and figures following, and sets out the printed paper and then orders the party to be committed for his contempt in printing and publishing the aforesaid printed paper so set out as aforesaid in the said schedule to the said petition, *quere*, whether the order contains a sufficient adjudication that a contempt has been committed?

6. The circulation of a libel on a Court relating to a matter disposed of by an order still in minutes is a contempt for which the Court may commit.

7. One judge of the Court of Review sitting as the Court may commit for contempt.

8. In an action for the imprisonment under the commitment, the order is pleaded, and the plaintiff demurs; *held*, that an injunction ought not to issue limiting the plaintiff as to the particulars in respect of which he might on such demurrer question the validity of the order.

1844

Ex parte  
VAN SANDAU.

appeal. It has been decided that every superior Court has the power of deciding conclusively what is a contempt of its authority. And even if it were a proper subject of appeal, the appeal must be by way of special case. Lord *Cottenham* (a) thought that this mode ought not to be departed from unless under the most extraordinary circumstances. If the case were brought on upon a petition of appeal, your Lordship would have to decide on the facts of the case, which the Lord Chancellor cannot do, according to the statute, on an appeal from the Court of Review.

Mr. *Bagshawe* and Mr. *Rolt* in support of the order. The facts are undisputed; whether they constitute a contempt is a matter of law and properly the subject of appeal to the Lord Chancellor. But we are deprived of the opportunity of bringing them before your Lordship by way of special case, because his Honor the Chief Judge declines introducing into the special case facts which we consider important. [*Lord Chancellor*. Is there any mode of appealing from the Court of Review as to the settlement of a special case? (a)] None, except by resorting to the other mode of appeal which the statute recognises, that by way of petition.

Mr. *Swanston* in reply.

LORD CHANCELLOR.—I think this case should be heard upon a petition of appeal. I entertain doubts whether a special case would be the proper mode of appealing under the circumstances, and one of the learned judges of the Court of Review also doubts whether it would. And as

(a) See *Ex parte Stubbs*, Mont. & Ch. 511.

the act of parliament leaves either course open to me, I think I ought, at all events, to allow it to be brought on in the other way. I should wish to hear the case first argued on the question of my jurisdiction in a case of contempt. If I think that I have jurisdiction, I may then order a special case to be settled. There would be two questions; first, upon the construction of the act, and next, whether there can be an appeal from one tribunal to another on the merits of a case of contempt. The motion must stand over generally to come on with the petition of appeal.

1844.  
  
 Ex parte  
 VAN SANDAU.

The appellant then filed a petition of appeal setting out all the orders appealed from.

The prayer was as follows:—

“ Your petitioner therefore appeals to your Lordship from the said several orders, and in particular from the said order for the committal of your petitioner, dated Saturday, the 4th day of February, 1844, and humbly prays that the said last-mentioned order, and also, if your Lordship shall think fit, all the several before mentioned orders consequent thereon or subsequent thereto, or such of them as to your Lordship shall seem meet, may be reversed or varied, and that your Lordship will also be pleased to make such further order as shall be necessary and proper in consequence of the reversal or variation of the said several orders or any of them which may be made by your Lordship, or that your Lordship will be pleased to make such other order in the premises as to your Lordship shall seem meet.”

The petition having come on on this day to be heard, November 6.

1844.  
 ~~~~~  
 Ex parte  
 VAN SANDAU,

Mr. *Bagshawe* and Mr. *Rolt* in support of the appeal. With regard to the jurisdiction, it cannot be maintained that the question, whether a certain act amounts to a contempt is not a question of law or equity. [*Lord Chancellor*. One question here is, whether the direction that the appellant should pay the respondents' costs was properly part of the order of committal. That is a question of law, capable of being the subject of appeal.] The first branch of the appeal, that which impugns the commitment for contempt and the consequent orders resolves itself into three points.

*First*, That the Court of Review improperly committed the appellant.

*Secondly*, That it improperly inflicted a fine upon him.

*Thirdly*, That it ordered this fine to be paid to private individuals.

The second branch of the appeal is that complaining of the order of injunction: on this head we shall contend—

*First*, That the Court had no jurisdiction to grant the injunction.

*Secondly*, That if the Court had jurisdiction, the jurisdiction was improperly exercised.

In the first place, the order of committal is wrong, being made by only one judge of the Court. The statute 5 & 6 Will. 4, c. 29, s. 25, expressly provides that nothing therein contained shall be deemed or taken to authorise or empower any judge or commissioner sitting alone to impose any fine or commit for a contempt of Court. [*The Lord Chancellor*. If you refer to the preceding part of the section, you will find, that it gives certain functions to a judge of the Court of Review, sitting alone, but these are not functions of a single judge when constituting



the Court of Review, because, when that act was passed, one judge could not form the Court. Then, a subsequent act provided that one judge may form the Court of Review, and I think that if a single judge, sitting as the Court of Review, commits for contempt, it is competent for him to do so, within the meaning of the act to which you are referring.] Next, the committal is wrong, for the order contains no adjudication of contempt. This is expressly decided in *Green v. Elgie* (a), where the order was substantially in the same terms as the present. There the Court of Queen's Bench decided that the warrant was void, because the order to which it referred recited the contempt, whereas it ought to have found and adjudged it; and further, that the contempt recited was mentioned in a petition and not in any document promulgated by the order of the Court.

1844.  
 Ex parte  
 VAN SANDAU.

At all events the order is wrong, in directing the payment of the respondent's costs, charges and expenses by the appellant; *Rea Faulkner* (b). Costs, charges and expenses are never ordered to be paid except in the case of trustees; *Fearns v. Young* (c). Upon the first branch of the argument they also repeated the arguments adduced on the hearings in the Court below. (See M. D. & D. 523, *et seq.*)

With respect to the appeal from the order of injunction, the Court had no jurisdiction to make such an order. [The *Lord Chancellor*. I do not understand how the order could be carried into effect, for the Court of law would be bound to decide according to the shape of the record and not according to the arguments of counsel. If counsel said they would not press an objection, that would make no difference; the Court would

(a) 8 Jurist, 186.

(b) 2 M. & A. 311.

(c) 10 Ves. 184.

1844.

Ex parte  
VAN SANDAU.

say there was error on the record. If it appeared that the order of the Court of Review did not warrant what had taken place, no amendment of the demurrer could prevent the question from being raised.] And, even to put the case on higher ground, the Court had no jurisdiction to grant the order; the cases relied upon on the other side depend entirely on the jurisdiction of the Lord Chancellor, and do not apply to the Court of Review. And *Ex parte Glossop* (a) shows that even the Lord Chancellor had no jurisdiction to grant an injunction on a petition in bankruptcy. [The *Lord Chancellor*. There seems to have been no argument in that case. In the same volume Sir *John Leach* decided in favour of the jurisdiction, saying a bill ought not to be filed; pointing out the inconvenience that would arise, that the jurisdiction in bankruptcy might be transferred to the Court of Exchequer.] The Court has only jurisdiction over parties connected with the bankruptcy; *Ex parte Cutts* (b). [The *Lord Chancellor*. If the Court of Review had simply adjudicated that Mr. *Van Sandau* was guilty of contempt, and committed him, there would have been an end of the matter: no Court of law would unravel it.] At all events it should be left to a Court of law to deal with. If the Court of Review has any jurisdiction to grant an injunction, it is only to restrain the bankrupt from disputing the fiat.

Mr. *Swanston* and Mr. *Simon* for the respondents. First, as to the order of commitment. It is the order of a Court competent to commit for contempt, and it is a commitment for contempt. It cannot, therefore, be subject to review in any other Court. This appears from Lord *Ellenborough's dicta* in *Burdett v. Abbott* (c).

(a) See *ante*, p. 35, note. (b) 3 M. & A. 549. (c) 14 East, 1.

[*Lord Chancellor*. My difficulty is, that this is a question of law, and that if I leave it to be decided by a Court of law, and that Court decides wrongly, the party aggrieved would be entitled to go to a Court of error, whereas, if it were decided wrongly under this jurisdiction, the party would not have a right of appeal. The case of *Green v. Elgie* (a) seems, as to one and the main point on which the judgment proceeds, to be precisely the same as this. The Court said, there is no adjudication of a contempt having been committed, and besides, the order refers to another document; but the Court expressly makes the first as well as the second the ground of its decision.] If so, the decision we submit is contrary to law. It is idle to say, when a Court states that it commits a party for his contempt in doing a particular act, that there is no adjudication of a contempt having been committed. Such a distinction carries us back to the dark ages. But it is sufficient to say that the order in *Green v. Elgie* differed from that which is here the subject of appeal.

1844.  
  
*Ex parte*  
*VAN SANDAU.*

But, if the order were wrong, still the appellant has acquiesced in it, and acted under it, and can not now be heard to dispute its validity. [*Lord Chancellor*. The error (if any) is a substantial error, and it is a bad order—not an irregularity with respect to which there can be any acquiescence or waiver. Regularity of proceedings is of the utmost importance in matters of contempt affecting the liberty of the subject.]

With regard to the jurisdiction of the Court to grant the injunction, the same arguments and authorities were adduced as in the Court below, and also *Ex parte Flet-*

(a) 8 Jan. 187.

1844.  
  
 Ex parte  
 VAN SANDAU.

*cher* (a), *Ex parte Figes* (b), *Ex parte Davy* (c), *Ex parte White* (d), and *Ex parte Lund* (e). If the form of the order of injunction were considered wrong, it might be varied. [*Lord Chancellor*. I do not see how it could be varied so as to accomplish the object of withdrawing from the consideration of the Court of Queen's Bench the form of the order.]

Mr. *Bagshawe* in reply. It is impossible to say the appellant is bound by acquiescence. *Levi v. Ward* (f).

November 15. LORD CHANCELLOR.—The facts of this case may be stated in a few words. A petition and a motion were depending in the Court of Review in the bankruptcy of a person of the name of *Martin*. Mr. *Van Sandau* and Messrs. *Turner* and *Hensman* were solicitors in the matter. An order was made upon the petition and motion; Mr. *Van Sandau* was dissatisfied with the decision, and he wrote, printed and published a libel upon the Court of Review, upon the eminent judge of that Court, and upon Messrs. *Turner* and *Hensman*, with respect to this matter. Messrs. *Turner* and *Hensman* complained, by petition, to the Court of Review, and the Court, after considering the subject, made an order, directing that Mr. *Van Sandau*, for his contempt in publishing the libel set forth in the schedule to the petition, should be committed to the custody of the keeper of the Queen's Prison. He was committed accordingly, and afterwards apologized, and was discharged. For the part which Messrs. *Turner* and *Hensman* took in this transaction,

(a) 1 Ves. & B. 350.

(b) 1 G. & J. 122.

(c) 1 M. & A. 283; 4 D. & C. 322.

(d) 4 D. & C. 279.

(e) 6 Ves. 781.

(f) 1 S. & S. 334.

Mr. *Van Sandau* commenced an action against them in the Court of Queen's Bench; he filed his declaration. They pleaded in justification the order of the Court of Review, and the warrant, both of which were set out at length in the plea.

To this plea Mr. *Van Sandau* demurred, and the case now stands for argument in the Court of Queen's Bench.

An application was made to the Court of Review to restrain Mr. *Van Sandau* from proceeding in this action, and made a qualified order on this application, restraining him from proceeding except for the purpose of raising certain questions. The Court of Review gave him permission on the argument upon the demurrer to object to the proceedings of the Court of Review on three distinct grounds, but restrained him, his counsel, &c., from raising any other questions upon the demurrer except those pointed out by the Court of Review. This is the state of things, and from this and some consequential orders, Mr. *Van Sandau* has appealed to this Court, and the question is, what course should be taken with respect to these matters. It was in the first place contended that no contempt had been committed. Now any person who reads the publication which is admitted to have been written, printed and circulated by Mr. *Van Sandau*, must be satisfied that it is a gross and impudent libel on the Court and the learned judge, imputing to him the most unworthy motives in pronouncing the judgment of which Mr. *Van Sandau* complains. A more gross and scandalous libel upon the administration of justice never was published. It was circulated while the matter was still pending, and before the minutes of the order were finally settled.

It further appears that it not only was extensively cir-

1844.

Ex parte  
VAN SANDAU.

1844.  
Ex parte  
VAN SANDAU.

culated, but that it was even distributed by Mr. *Van Sandau* in the Court itself, and in the presence of the learned judge, to solicitors who were attending the business of the Court. That such conduct was a contempt, a gross contempt of the Court, no reasonable man can for an instant doubt.

Lord *Hardwicke*, in the case of the General Evening Post, reported 2 Atkins, 469, in enumerating the different kinds of contempt, states as one distinct head of contempt the scandalizing of the Court itself.

I might further refer upon this point, if it were necessary, to the elaborate judgment of Chief Justice *Wilmot*, written but not delivered, in the case of *The King v. Almon*, in which the subject is learnedly and elaborately considered.

The next point urged was that the Court of Review possessed no authority to commit for contempt. But by the act 5 & 6 Will. 4, c. 29, s. 25, it was declared that the Court of Review shall be a court of record, and may have, use and exercise all the powers, rights and privileges of a Court of Record as fully to all intents and purposes as the same are used by any of his majesty's courts of law at Westminster, and the Court is in terms authorized to commit for contempt. But a distinction was taken. It was said that under this clause a judge sitting alone cannot commit for a contempt. This requires some explanation. The Court originally consisted of four judges; the number was afterwards reduced to three; and certain powers were given to them sitting as the Court of Review; but the judges might also sit alone in performing the other duties prescribed by the act 5 & 6 Will. 4, c. 25. When, therefore, that act says that a judge or Commissioner sitting alone shall not commit for

a contempt, it obviously means a judge sitting, not as the Court of Review, but acting as a judge in the exercise of the other duties prescribed by the statute. By a subsequent act, power is given to a single judge to constitute the Court of Review; but the judge so sitting as the Court of Review does not come within the exception as to commitments for contempt, which relates only to a single judge, sitting in his individual character for the purpose already stated, and not as the Court of Review. The objection originates in a misapprehension of the meaning of the act of parliament, and is obviously unfounded.

The next question relates to the form of the order. It is said the order is vicious, as it contains no adjudication of a contempt having been committed. The order is in this form. It recites the petition and the libel, the latter being annexed to the petition as a schedule, and then it goes on in these words: "And whereas the schedule to the petition was in the words and figures following," and then the libel as set out. "Now upon the hearing, &c. this Court doth order the said *Andrew Van Sandau* do stand committed to the custody of the keeper of the Queen's Prison for his contempt in printing and publishing the aforesaid printed paper so set out as aforesaid in the schedule to the said petition." It is said that this does not amount to an adjudication that Mr. *Van Sandau* had been guilty of a contempt, but merely assumes his guilt, and upon that assumption the order directs that he be committed to prison. Different precedents were referred to. First, Mr. *Long Wellesley's* case, before Lord *Brougham*. In that case there was a distinct adjudication that a contempt had been committed. The order recites the facts, and contains the decision of

1844.  
  
 Ex parte  
 VAN SANDAU.

1844.

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Ex parte

VAN SANDAU.

the Court on those facts, declaring that the conduct of Mr. *Long Wellesley* was a gross and aggravated contempt of Court, and that as Mr. *Wellesley*, notwithstanding admonition, persisted in such his contempt, the Court ordered him to be committed to the Fleet Prison. In that case, therefore, there was a precise and distinct adjudication. The next case was that of Mr. *Lechmere Charlton*, before Lord *Cottenham*. In that case also there was an adjudication. The facts are stated, and the order runs thus: "The Lord Chancellor, upon taking the said matter into consideration, and deeming the conduct of the said *Lechmere Charlton* therein a contempt of this Court, doth think fit and so order, &c." The order in the case of Mr. *Lechmere Charlton* was founded on that made by Lord *Hardwicke* in the case of *Martin*, which is in precisely the same terms; and there is no doubt that Lord *Cottenham* framed his order upon that precedent, which has, therefore, the sanction of those two distinguished and learned judges.

The case of *Green v. Elgie*, in the Court of Queen's Bench, was also cited. The order in that case was made by the Court of Review, committing *Green* for contempt. He brought an action against *Elgie* for the part which he had taken in the proceeding. The order was set out in the plea of justification; but the Court of Queen's Bench thought it defective, as it did not adjudge that any contempt had been committed.

The order stated "that *Elgie* had preferred his petition, praying that *Green* might be committed for his contempt of the order in the petition mentioned or referred to, and that on reading the petition the affidavits and the former order of the Court, the Court ordered that *Green* should stand committed for his contempt in the said petition mentioned or referred to."



In all criminal cases, it is necessary that there should be a charge, a finding and a conviction as a foundation for the sentence.

1844.  
  
 Ex parte  
 VAN SANDAU.

Everything should be strictly and accurately pursued, and if in any one of these three points a substantial defect should appear, it would be a ground for reversing the proceeding. The question, therefore, will be whether there is in this case a sufficient adjudication; the words are, "for his contempt in writing, printing and publishing the aforesaid printed papers so set out as aforesaid in the schedule to the said petition."

Does this amount to sufficient averment that Mr. *Van Sandau* published the paper in question, and to an adjudication that in so doing he had committed a contempt? Now, considering that I am sitting here in bankruptcy, and that from the form in which this question has come before me, doubts may be entertained whether there could be an appeal from my decision; and advertng to the authorities which have been referred to, I think I ought not to give an opinion in affirmance of the sufficiency of the order, and at the same time follow it up by an injunction to restrain the party from taking the opinion of a court of law upon the subject. It was contended that the Court of Review has no power to grant an injunction, at least not an injunction of this sort, and the particular form of the injunction has been made the subject of comment. I think it unnecessary to decide the former of these questions; for, assuming that the Court of Review had authority to grant the injunction, the question would still remain to be considered whether I ought, under the circumstances to which I have adverted, to sanction the injunction in such a case as the present.

1844.  
~~~~~  
Ex parte  
VAN SANDAU.

Then as to the form of the injunction. When the injunction was issued, the record in the Court of Queen's Bench was complete; there was a declaration, a plea and a demurrer.

The plaintiff is permitted upon the demurrer to argue certain questions and not others. Three objections are mentioned in the order, upon which alone he is permitted to insist.

If the order of commitment is defective in substance, the injunction would be ineffectual. But the defect relied upon, if it be a defect, is one of substance and not of form. It must appear on the record, and the Court of Queen's Bench would, in the proper discharge of its duty, and whether the objection were made by counsel or not, take notice of it, and give judgment accordingly.

I think, therefore, the order for the injunction should be discharged.

I confine myself to discharging the injunction. After the demurrer has been argued, the parties may again apply to the Court, if they should be advised.



1844.

Ex parte HORNBY and others.—In the matter of  
JOHN BANGLEY PRITCHARD and JAMES  
ROBINS CROFT.

*Lincoln's Inn,  
Nov. 26.*

**THIS** was the petition of the assignees, praying that the respondents, the bank of Liverpool, who had proved upon certain bills of exchange, might refund the dividends received upon the proofs, under the following circumstances.

The bankrupts kept a banking account with the bank of Liverpool; and in the course of their dealings, the bankrupts indorsed and paid into the bank the bills of exchange in question. In accordance with the usual course of dealing between the bankrupts and the bank, the bills when paid in were carried to the credit of the former, and cheques were drawn by the bankrupts, and payments made on their account from time to time. On the bills arriving at maturity, the bankrupts were debited with the amount of those which were dishonoured. The balance of the account was struck every half year.

On June 15th, 1841, the public officer of the bank proved for 3840*l.* 6*s.*, being 57*l.* 3*s.* for commission and charges, and 3783*l.* 2*s.* 4*d.* for principal and interest upon twenty-eight bills of exchange and promissory notes, specified in a schedule to the depositions made on the proof, all of which were then in the hands of the bank, and unpaid, some of them being overdue and dishonoured.

On August 31st, 1841, a dividend of 7*s.* 6*d.* in the pound was declared.

Before the declaration of a dividend, six of the bills,

A customer pays in bills of exchange to his bankers and becomes bankrupt. The bankers prove for the whole balance due from him, and afterwards some of the bills of exchange paid in are paid in full by other parties liable, some before and some after the dividend is declared. *Held*, that the proof ought to be reduced by the amount of the paid bills and the dividends refunded.

1844.

Ex parte  
HORNEY  
and others.

amounting to 448l. 8s. 7d., had been paid in full by other parties liable. On application being made on behalf of the bank for payment of the dividend, the assignees claimed to deduct from the proof the amount of the paid bills, and to have the benefit of the bills which might thereafter be paid. It was however arranged that the dividend should be paid on the whole proof, without prejudice to the right of the assignees to call upon the bank to refund so much as the latter should not be entitled to retain.

Two others of the bills were also paid in full by the parties liable, one partly before and partly after, and the other wholly after the declaration and payment of the dividend.

The prayer was, that the dividend on the first six bills might be refunded, and the proof reduced by the amount of those bills, and the same with regard to the two last-mentioned bills, or that as regards these that the proof might be reduced.

Mr. *Bacon* in support of the petition. Each bill is a separate debt, and the bank having received on some of the bills more than 20s. in the pound must refund, and the proof must be reduced. *Ex parte Brunskill*(a), in the matter of *Garner*(b), *Ex parte Burn*(c), *Ex parte Bloxham*(d), *Ex parte Smith*(e).

Mr. *Russell* and Mr. *Rolt* for the bank. The bank cannot be called on to refund till it has received 20s. in the pound on the whole amount of the debt. At all events, the Court cannot order the dividend to be re-

(a) 2 M. & A. 220; 4 D. & C. 445.

(b) Mont. & Ch. 301, and see *Ex parte Barratt*, 1 G. & J. 327.

(c) 2 Rose, 57.

(d) Cooke B. L. 167

(e) *Ibid.*

funded upon the two bills which were unpaid when the dividend was received, for that dividend was properly paid at the time, and is not recoverable by the assignees, whatever may be the rights of the party paying the bill (a).

1844.

*Ex parte*  
Hornby  
and others.

The CHIEF JUDGE.—I collect from the observations of counsel that it would not be beneficial to the creditor to treat the transaction as a mortgage, that is to say, to consider the bills pledged as a security for the debt. Supposing that not to be desired, there is, I am afraid, no other alternative than to treat the proof as divisible, and each bill as a separate debt (b). One bill was paid in full before the dividend was declared, and that fact was not disclosed by the creditor, nor was known to the assignees. No application was therefore made to reduce the proof, which otherwise would have been reduced. The dividend was consequently on too great an amount, and as it was, I think, paid and received in mistake, the proof must now be reduced retrospectively, and a proper part of the dividend refunded. Then with regard to the payment of the bills which were paid in full after the receipt of the dividend—the creditor has no right as against the bankrupt's estate to receive more than 20s. in the pound upon those bills, and must refund the surplus.

The Order was, that the proof should be reduced by the amounts proved on the bills, and that the bank should refund the dividends.

(a) *Per* Erskine, J. in *Ex parte Carr*, 3 M. & A. 66.

(b) See *Ex parte Barratt*, 1 G. & J. 327.

1844.

December 18,  
1843.June 26,  
July 1 and 16,  
November 11,  
19, 26 and 29,  
1844.

On a petition for the appointment of a new trustee in the place of the bankrupt, and that the new trustee might use the bankrupt's name in certain proceedings, the petitioner was ordered to pay the costs of the bankrupt and the assignees to them respectively. The bankrupt, who was a solicitor, and acted for himself in the matter of the petition, had not obtained his certificate. *Held*, that the costs ordered to be paid to the bankrupt belonged to him, and did not pass to the assignees. Practice under the new orders as to issuing writs of execution.

Ex parte CHARLOTTE GRIMSTEAD.—In the matter of JAMES GIBBS.—Ex parte JAMES GIBBS.—In the same matter.—Ex parte WILLIAM STRAHAN, Sheriff of Surrey.—In the same matter.

THE first of the above cases was the petition of the executrix of a *cestui que trust* under certain indentures, by which the bankrupt was constituted a trustee of two annuities, collaterally secured by judgments. By virtue of one of the judgments, the benefice of the grantor of one of the annuities had been sequestered by the bankrupt. The prayer of the petitioner was for the appointment of a new trustee in the place of the bankrupt; and that the bankrupt might execute the necessary assignments of the annuities, and might be restrained from discharging the sequestrations, or receiving anything under them; and that the new trustee might be at liberty in the bankrupt's name under the existing sequestrations.

The bankrupt and the assignees were served with, and appeared to the petition; and an order was made removing the bankrupt from being trustee, and directing him to concur in the requisite assignment, and that the new trustee might use the bankrupt's name (first indemnifying the bankrupt) for the purposes in the order mentioned; and it was further ordered that the costs of the bankrupt and assignees of and occasioned by the application, and of the assignment thereby directed, should be paid to them respectively by the petitioner.

The bankrupt was a solicitor, and acted for himself in the matter of the petition.

The bankrupt's costs not having been paid,

June 26.

Mr. Swanston, on this day, moved on his behalf that

the order might be marked by the registrar with the date of the passing of the order, according to the orders of April 24, 1844 (a); so that a writ of *fi. facias* might issue thereupon.

1844.  
~  
Ex parte  
GRIMSTEAD  
and others.

Mr. *Trowers*, for the party ordered to pay the costs, said she could not safely pay them to the bankrupt, because he had not obtained his certificate. They belonged to his assignees.

The COURT directed the order to be delivered to the officer to be marked.

Mr. *Swanston* moved that a writ of *fi. fa.* might issue. July 1.

The CHIEF JUDGE.—I think, under the circumstances, the assignees should be served with notice of this motion.

The assignees having been served, the motion was renewed on this day. July 16.

Mr. *Swanston* in support of the motion. These costs were given to the bankrupt for an indemnity. He was directed by the Court to do certain acts, which involved him in expense. A very large portion of it is outlay. The Court will not permit the assignees to step in and deprive the bankrupt of his costs. No part of the litigation originated with the bankrupt. He was obliged to come here, being served with the petition. The meaning of the order is that the costs be paid to the bankrupt personally. [The *Chief Judge*. If the bankrupt had

(a) See 3 M. D. & D. Appendix, cix.

1844.

Ex parte  
GRIMSTEAD  
and others.

employed a solicitor, the solicitor might have had a lien on the costs.] Then he is not to be in a worse position, because he is his own solicitor. Here the money is ordered to be paid to the bankrupt by a judicial act, and the Court is asked to defeat its own order. He cited *Chippendale v. Tomlinson (a)*, *Silk v. Osborn (b)*.

Mr. *Bacon* for the assignees. A sum of money is ordered to be paid to an uncertificated bankrupt. Why are not the assignees entitled to it? *Chippendale's* case only decided that the bankrupt may sustain an action, if the assignees do not intervene. [The *Chief Judge* referred to *Kinnear v. Tarrant (c)*, and *Kitchen v. Bartsch (d)*], *Crofton v. Poole (e)*, *Webb v. Ward (f)*, *Evans v. Brown (g)*.

Mr. *Swanston* in reply.

THE CHIEF JUDGE.—The costs in this case were incurred by the bankrupt as respondent in the character of trustee, and were adjudicated to him in that character by an order to which the assignees were parties. The order directed that the costs of the bankrupt and of the assignees should be paid to them respectively by the petitioner. The assignees have never instituted any proceeding or taken any step for the purpose of claiming the benefit of this order. They have merely given notice, to the party liable, to pay the costs to them. Under all the circumstances of the case, I think I ought to allow the matter to take its course, and to permit the party,

(a) 1 Cooke, B. L. 428.

(d) 7 East, 62.

(f) 7 T. R. 297.

(b) 1 Esp. 140.

(e) 1 B. & Ad. 568.

(g) 1 Esp. 170.

(c) 15 East, 622.



to whom the costs are directed to be paid, to proceed to recover them, without prejudice to any question as to the title to the money when recovered. If the assignees choose to take any step as actors, they may be at liberty to do so. All that I at present direct is that the registrar do issue the writ. With regard to the costs of this application, I do not think the party who originally raised the difficulty ought to receive or pay any; and, as between the bankrupt and the assignees, I reserve the question of costs.

1844.  
  
 Ex parte  
 GRIMSTEAD  
 and others.

The writ having issued, the sheriff levied upon it, and the assignees having given him notice not to pay over the money to the bankrupt, November 11.

Mr. *Swanston* on this day applied to the Court for an order that the sheriff should make his return to the writ.

The CHIEF JUDGE.—Let the officer inquire into the practice in chancery, and issue the proper order.

The assignees having commenced an action against the sheriff for the money levied, and Mr. Justice *Patteson* having given his opinion that the sheriff was, in this matter, the officer of the Court of Review, and should apply to that Court, November 19.

Mr. *Rogers* on this day moved on behalf of the sheriff that the time for the return of the writ should be enlarged. He cited *Ward v. Parnter* (a), *Harden v. Forsyth* (b), *Beavan v. Dawson* (c), and *M'George v. Birch* (d).

(a) 2 Bea. 85.

(b) 1 Ad. & El. 177.

(c) 6 Bing. 566.

(d) 4 Taunt. 685.

1844.

Ex parte  
GRIMSTEAD  
and others.

The COURT ordered that the time should be enlarged till further order, and that the motion should stand over for the question to be argued between the bankrupt and the assignees as to the right to the money, the assignees being restrained in the meantime from proceeding in the action.

November 26.

On the motion coming on accordingly on this day, Mr. *Swanston* for the bankrupt again cited *Silk v. Osborn*(a), and *Chippendale v. Tomlinson*(b). [The Chief Judge. How is *Crofton v. Poole*(c) to be reconciled with *Silk v. Osborne*?] There is a distinction between gross profits and net profits. What remained to the bankrupt after reimbursing him his expenses, and compensating him for his labour and exertions, may properly belong to the assignees.

In the case of a second bankruptcy, when a dividend of 15s. in the pound has not been paid, the strict legal rights of the assignees have even at law been held subject to qualification, if they permit the bankrupt to trade again without interfering; *Butler v. Hobson*(d), *Ex parte Bourne*(e). He also referred to *Sidebotham v. Barrington*(f).

Mr. *Bacon* for the assignees. There is no doubt as to the decision in *Silk v. Osborne*. There was enough in the case to warrant it. The assignees did not claim there. That is the distinction on which all the cases turn. In *Kitchen v. Bartsch*(g) Lord *Ellenborough* said, “*Chippendale v. Tomlinson* is referred to as showing that the bankrupt is entitled to the earnings of his

(a) 1 Esp. 140.

(c) 1 B. &amp; Ad. 568.

(b) Cooke, B. L. 462, 4th ed.

(d) 5 Bing. N. C. 128, and 5 Scott, 798.

(e) 2 G. &amp; J. 141.

(f) 3 Bea. 524.

(g) 7 East, 62.

personal labour, without which it is said he would be left to starve, which could not have been intended by the legislature. The hardship of that case might perhaps have warped the opinion of the judges, when the evil might have been better remedied by statute." And *Lawrence*, J. said, "In all modern cases, when the action brought by the bankrupt against third persons has been sustained, it has been distinctly stated that the bankrupt can only recover when the assignees do not interfere. Here it is expressly stated that they do interfere and require the deponent to pay the debt to them. In *Herbert v. Sayer* (a) the judgment of the Court proceeded entirely on the want of a statement that the assignees had interfered. In *Crofton v. Poole* (b) the bankrupt was a furniture broker, and brought an action to recover a debt for removing goods; and Lord *Tenterden* said, "I think the assignees had a right to intervene, and that the plaintiff, who, it appears, in the course of this business employed several persons under him, and used vans for the removal of furniture, and in several instances provided and sold goods, and who upon the whole was acting as a furniture broker, could not be considered as a man using merely his personal labour. He therefore was not entitled to recover this debt, if the assignees thought proper to put in their claim;" and the bankrupt was nonsuited.

1844.

Ex parte  
GRIMSTEAD  
and others.

Mr. *Swanston* in reply.

*Cur. ad. vult.*

The CHIEF JUDGE.—In this case I agree with Mr. Justice *Patteson* as to the propriety of an application by the sheriff to this Court, in the character of whose officer

November 28.

(a) 2 Dowl. & L. 49.


(b) 1 B. & Ad. 568.

1844.

Ex parte  
GRIMSTAD  
and others.

he levied the sum to which conflicting claims between the other parties were raised.

That, the sheriff and the bankrupt submitting as they do to the jurisdiction, and the only other claimants being the assignees, it is competent to the Court, according to the familiar and established course of its jurisdiction, to adjudicate upon the right to the money in dispute, supposing the evidence sufficient, can, of course, not be reasonably questioned, nor indeed have the assignees disputed. I think the evidence sufficient, and upon that evidence I conceive it to be for the benefit of the estate to be administered by the assignees, that the assignees should not prosecute the claim. The nature and object of the petition, upon which the order that gave the bankrupt the costs in question was made, the nature and form of that order, to which the assignees were parties, the principles of law, and the weight of dicta, and indeed of authority, as I view the subject, applicable to the question of an uncertificated bankrupt's claiming to be protected in the enjoyment of the earnings of his labour, satisfy me that the bankrupt ought to be allowed to receive the money in the hands of the sheriff, and I so direct. The assignees must pay the costs of all parties, and I suppose that I may, without impropriety, allow them to be repaid by the estate.



1844.

Ex parte ELIZABETH POULSON and others.—In the matter of JOHN HARFORD and WILLIAM WEAVER DAVIS.

Lincoln's Inn,  
Nov. 27.

THIS was a petition to prove in respect of a breach of trust, and for the appointment of new trustees of two wills.

The first will was that of *Elizabeth Weaver*, dated January 12th, 1827, and the testatrix thereby bequeathed to *Samuel Harford* and the bankrupt, *W. W. Davies*, their executors and administrators, 3000*l.* upon trust to lay out and invest such sum of 3000*l.* in or upon any of the parliamentary funds of Great Britain or on real securities in England, or advance or lend the same to the house of *Harford, Brothers & Co.*, or by whatever other firm the same might be called, at interest, with power to vary, alter and transpose such stocks, funds or securities for other of the like nature, when and so often as it should seem expedient, and to pay the interest and dividends of the securities upon which the sum of 3000*l.* should be invested into the proper hands of the petitioner, *Elizabeth Poulson*, the wife of *George Poulson*, exclusive of her then present or any future husband, and subject thereto on divers trusts for the benefit of the children of the marriage. The other will was that of *Sarah Davies*, dated January 12th, 1827, which, after bequeathing her residuary estate to the same trustees as those appointed under the will of the other testatrix, directed them to set apart a sum of 3000*l.* upon exactly

A testatrix bequeathed 3000*l.* to two trustees upon trust to invest it in the funds or on real securities, or to lend it to the house of *H. & Co.*, by whatever firm the same might be called, at interest, with power to vary the securities for others of a like nature. The house of *H. & Co.*, then consisted of the two trustees and two other partners. One of the trustees died, and successive changes took place in the firm, which ultimately consisted of the surviving trustee and a new partner, who had notice of the trust. At the death of the testatrix, the then firm owed to her estate more than 3000*l.*, and that amount, less the legacy duty, was suffered to remain due from them at interest, and was, on the successive

changes of the firm, carried over to the credit of the trustee as due from the new firm, and on the last change, the surviving trustee took from his partner and himself a promissory note for the amount, payable six months after notice. On the firm becoming bankrupt, held, that a breach of trust had been committed, and that there was a right of proof against each separate estate.

1844.  
Ex parte  
POULSON.

similar trusts to those of the other will, except that, in the power to lend to the house of *Harford, Brothers & Co.*, the words or “by whatever firm the same may be called” were omitted.

The testatrixes both died in 1828, and the wills were proved by *W. W. Davies*, who was appointed executor under each of them. At the time of the deaths of the testatrixes the house of *Harford, Brothers & Co.*, was composed of the two trustees and of two other partners named *Richard Summers Harford* and *William Green*, under the style and firm of *Harford, Brothers & Co.* They had then in their hands monies of the testatrixes of larger amount than sums of 3000*l.* bequeathed by the wills. The firm of *Harford, Brothers & Co.*, by the direction of the bankrupt *Davies*, retained in their hands 5880*l.*, the amount of the legacies, less the duty, and debited themselves with the amount in their books as being due in respect of monies then in their hands belonging to the estates of the testatrixes, placing that sum to the credit of *Samuel Harford* and *W. W. Davies* as the trustees under the wills. In 1832 a change took place in the partnership of *Harford, Brothers & Co.*, upon the death of one partner and the retirement of another, and the partnership having been dissolved, a new partnership, consisting of *Richard Summers Harford, John Harford* and *W. W. Davies*, was constituted under the firm of *Harford, Davies & Co.* This last-mentioned partnership continued to the year 1836, when *Summers Harford* and *Charles Lloyd Harford*, sons of *R. S. Harford*, were admitted as partners, but no change took place in the style of the firm. In 1837 *R. S. Harford* died, and in 1838 another new partnership was formed, consisting of the bankrupts, *J. Harford* and *W. W.*

*Davies*, together with *Summers Harford*, *Charles Lloyd Harford* and *Samuel Harford Lury*, who carried on business under the same name of *Harfords, Davies & Co.*

1844.  
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Ex parte  
POULSON.

*S. Harford* died in 1838, whereupon *Davies* became the sole trustee of the trust monies.

On the occasion of the several changes in the said partnership, the trust fund or debts of 5880*l.* was, with the knowledge or by the direction of the bankrupts, *W. W. Davies* and *J. Harford*, transferred and entered in the books of each of the said several successive firms to the credit of *S. Harford* and *W. W. Davies* as trustees of the wills during the life of *S. Harford*, and after his death to the credit of the bankrupt, *W. W. Davies*, as surviving trustee. Upon the formation of the last-mentioned partnership, the bankrupt, *Davies*, took from the partners a promissory note for the sum of 5880*l.*, dated November 18th, 1839, and payable to him as surviving trustee, six months after notice given in writing

In 1841 another dissolution took place of the partnership, *S. Harford*, *C. L. Harford* and *S. H. Lury* retiring therefrom, and a new partnership being formed between *J. Harford* and *W. W. Davies*, who continued alone to carry on the partnership up to the date of the fiat under the firm of *Harford, Davies & Co.* Upon the last dissolution it was stipulated that the bankrupts should take upon themselves and discharge all the debts and liabilities of the firm of *Harfords, Davies & Co.*; and that with regard to such debts as were due and owing from and by the former partnerships, so as to exonerate the retiring partners. In pursuance of this stipulation the bankrupt, *Davies*, delivered up and can-

1844.  
  
 Ex parte  
 POULSON.

called the promissory note of the 18th day of November, 1839, and signed thereon the following memorandum :

“ 1842, May 18.

“ Received the amount of this note with interest to this day.

“ *W. W. Davies.*”

A fresh note was thereupon made and signed by the bankrupts by their style of *Harford, Davies & Co.*, dated May 18th, 1842, whereby they promised to pay to the bankrupt, *Davies*, as surviving trustee, his executors or administrators, six months after notice given in writing, the said sum of 5880*l.* with interest, after the rate of 5*l.* per cent. per annum. No security was taken or required by the executors, *S. Harford* and *W. W. Davies*, or either of them, except the promissory notes. The interest of the trust fund was paid to the petitioner, *Elizabeth Poulson*, up to May 18th, 1843.

The fiat issued on the 14th of June, 1843, and under it proof had been made against the joint estate ; this proof the petitioners now sought to have expunged as having been made by mistake, and they prayed now to be at liberty to prove against each of the separate estates, the result of which would be that the debt would be paid in full.

Mr. *Bacon* in support of the petition. There can be no doubt that a breach of trust has been committed here, the trust fund being lent to a house other than that specified in the wills. The wills authorise a loan to *Harford, Brothers & Co.*, “ by whatever firm they may be called,” but do not authorise a loan to any other partner-



ship. And although the trustees are empowered to lend out at interest, yet that does not mean to lend without security. Then, there being a breach of trust, the bankrupts, having notice of the trust and being thereby trustees, are jointly and separately liable, and the petitioners are entitled to prove against the separate estate of each.

1844.  
  
*Ex parte*  
 POULSON.

Mr. *Rolt* for the assignees. The testatrix has not required any security to be taken. If it be said that the stipulation as to six months' notice is unauthorised, the answer is, that you cannot lend to a commercial house on any other terms. If the firm be not the same, still the investment or security falls within the power to change for other securities of a like nature. And, at any rate, there is only a debt due; the separate estate of the bankrupt, *Harford*, is not liable; *Ex parte Burton* (a). *Ex parte Woodin* (b) is distinguishable from this case, for there the bankrupts had taken upon themselves the characters of trustees by making payments in pursuance of the trusts.

The CHIEF JUDGE.—My present impression is, that all the acts established in this case amount together to a breach of trust. I do not say that any one of them would of itself constitute a breach of trust, but on the aggregate I think there is no doubt that a breach of trust has been committed. I doubt whether the language of the will authorised the trustees to take the credit of a firm different from the firm mentioned by the testatrix as it stood at her death or at the date of the

(a) 3 M. D. & D. 364.

(b) 3 M. D. & D. 399.

1844.

  
Ex parte  
POULSON.

will. My present impression is, that the trustees had no authority to release the original partners, who were partners at the time when the will was made, in the manner in which they were released. And I am of opinion, also, although I think the observation of Mr. *Rolt* on that point deserves attention, that the restriction to which the trustees submitted of giving six months' notice prior to calling in the trust money was irregular and improper. Accordingly, I think, Mr. *Davies* was separately liable for this money as a trustee regularly appointed, who had committed a breach of trust. My impression also is, that Mr. *Harford* must be also taken to have constituted himself directly a trustee of the fund. He had actual knowledge of the circumstances of the case and of the rights of the parties interested in the fund, and the Court must impute to him knowledge of the law applicable to the case. With this actual knowledge of the facts, and with this imputed knowledge of the law, he concurred as far as in him lay in releasing parties, who had become liable for the trust funds, and in placing the money in his own hands and those of his partner, subject to an agreement that it should not be called in without six months' notice. My present impression is, that he became personally liable separately, and that there is a right of proof against his separate estate. But I will reconsider the case, and if I change my present view with respect to it, I will mention it again.

On a subsequent day the CHIEF JUDGE said:—I have already stated my opinion, that as far as Mr. *Davies* was concerned there was a breach of trust committed with respect to the sums in question which makes his separate estate liable.

The question, upon which I was less clear was, as to the separate liability of the estate of the other bankrupt, Mr. *John Harford*. He appears to have become a member of the house of business of *Harford, Brothers & Co.*, or *Harford, Davies & Co.*, in 1838, and not before. The house at the end of that year consisted of five persons, including the two bankrupts. Thus composed, it comprised some persons who were not, but did not comprise all who were, partners in the firm at the deaths of the testatrixes respectively.

The sums in question must be considered as having come into the hands of the five who constituted the house at the end of the year 1838, with notice of the trusts affecting them, and I repeat, that by the act of allowing, as Mr. *Davies* did allow, the money thus to come into the hands of the five, he committed in my opinion a breach of trust. I do not say that he had not previously committed a breach of trust as to this money.

In 1839 a promissory note for the money is given by the partnership of the five to Mr. *Davies* as the surviving trustee of the wills (he then was so) payable six months after notice in writing.

In 1841 the partners other than the two bankrupts retire from the partnership and business, which are thenceforth carried on by the two bankrupts alone. Upon the occasion of this dissolution and new partnership it was agreed between them all that the bankrupts should assume and pay all debts due from the five, including the debt in question, to the exoneration of the other three. Accordingly, the note of 1839 was cancelled, and in lieu of it a note in the same form, *mutatis mutandis*, was given in 1842 to Mr. *Davies* by the new firm of the two bankrupts.

1844.

  
Ex parte  
POULSON.

1844.  
Ex parte  
POULSON.

The bankrupt, Mr. *John Harford*, having been a party to each of these transactions, I must, I think, hold, that in 1842, if not before, he made himself, I do not say in name or in form, but in effect and substance, a trustee of the money; that is to say, a trustee of it for every purpose of personal liability. He became directly and actively concerned as a party in irregular and unauthorized dealings with trust money having actual and complete notice of the trust in contravention of which those dealings were. He became so in conjunction with the formal and appointed trustee, whose peculiar duty it was to protect the fund. The object and effect of the dealings being to give him, Mr. *John Harford*, a joint possession of the property, I must, under such circumstances, declare that the amount of the fund is not only a joint debt of the two bankrupts but also the separate debt of each. Upon that footing the rest of the order is, I believe, not a matter of contest, unless, perhaps, as to the costs. The petitioners must bear their own, and, under the circumstances, should pay a small sum (probably 40s. will be enough) towards the assignees' costs, of which the residue must be paid out of the two separate estates.

Ordered accordingly.



1844.

In the matter of THOMAS TODD.

SPECIAL CASE.

*Before the Lord  
Chancellor,  
November 8.*

IN November 1833, *Thomas Todd* and *Francis Deflinne* entered into partnership at Manchester as gingham manufacturers, under a verbal agreement, which was reduced into writing in the February following. The partnership was carried on under the name of *T. Todd* alone.

About the time of the formation of this partnership, *Deflinne* obtained advances of money from his uncle, *Thomas Wood*, to the amount of 3000*l.* and upwards, and in or about the month of May, 1834, he obtained an advance of 3000*l.* from his uncle *Joseph Wood*.

On the 23rd of December, 1833, and at subsequent dates, *Deflinne* brought into the partnership various sums of money, amounting altogether to upwards of 7000*l.*, and the money so brought in by him formed the capital of the partnership.

The partnership was known to *T. Wood* and *J. Wood*.

In December, 1836, the partnership stock and effects were valued.

On the 2nd January, 1837, *Todd* and *Deflinne* dissolved the above partnership. On that occasion they entered into the following agreement in writing.

Memorandum. That the within partnership was this day dissolved by mutual consent on the following terms. *T. Todd* to receive all debts due to the concern, and to indemnify *F. Deflinne* from all claims against the partnership; *T. Todd* is to give his bond for 8000*l.*, bearing

On a dissolution of partnership, the retiring partner gives to the continuing partner a bond for a sum payable by instalments, and after one instalment is paid, it is agreed that the bond shall be cancelled, on the obligor giving fresh bonds for sums amounting to the sum then due; such new bonds being executed to obligees nominated by the retired partner. At the time of executing the new bonds, the obligor is under some degree of pecuniary pressure, but does not contemplate bankruptcy or insolvency. Afterwards he becomes bankrupt. Held, that the new obligees were entitled to prove against his estate, and that the want of any notification of the dissolution of partnership, or of any change in the style of the firm, or of any consideration between the new and old obligees, or between the obligor and the new obligees, would make no difference.

ligees, or between the obligor and the new obligees, would make no difference.

1844.  
In the matter of  
Todd.

even date herewith, to be paid to *F. Deflinne* by the instalments therein mentioned, and to give his promissory note for the further sum of 1175*l.*, which is to carry interest after the rate of 5*l.* per cent. per annum, after the 31st of December next, if not paid before that time.

It was also a term of the agreement of dissolution, though not expressed in the above memorandum, that *Todd* should retain the stock and effects of the concern, and he retained the same accordingly.

The dissolution proceeded on the footing of the valuation of 1836, which was fairly made, but was not made with a view to the dissolution.

*Todd*, in pursuance of the agreement, gave to *Deflinne* a bond for 8000*l.*, dated 2nd January 1837, and payable by instalments of 1000*l.* per annum with interest. The above sum of 1175*l.* was subsequently paid by *Todd* to *Deflinne*, and on the 23rd of December, 1837, *Todd* paid *Deflinne* 1000*l.*, part of the principal of the bond, and that sum was the only portion of the principal that was ever paid. The interest on the bond was paid by *Todd* to *Deflinne* up to 31st December, 1841.

Previously to the bond for 8000*l.* being given, *Deflinne* proposed to *Todd* that two bonds amounting together to 8000*l.* should be given, one to his uncle, *T. Wood*, and the other to his uncle, *J. Wood*, instead of the bonds to himself for the sum of 8000*l.*, but this *Todd* declined.

In or before the summer of 1841, the agreement made on the dissolution in January, 1837, had proved to be a losing bargain to *Todd*. This was known to *Deflinne* in the summer of 1841.

In the same summer some of *Todd's* acceptances were dishonoured, and he was under some degree of pecuniary

pressure. This was known to *Deflinne* in the same summer.

1844.

In the matter of  
TODD.

On the 29th March, 1842, *Todd's* bond to *Deflinne* for 8000*l.* was given up by the latter to *Todd*, and in lieu of it the joint and several bonds of *Todd* and *Deflinne* for the payment of 4000*l.* and 3000*l.* to *T. Wood* and *J. Wood* respectively, were executed and dated as of the 1st of January preceding.

It was the intention of *Deflinne* and his uncles, that his uncles should have the benefit of these bonds.

It is on one of these bonds, viz. the bond for 3000*l.*, that the present respondent, *J. Wood*, has made the proof against the estate of the bankrupt which is the subject of the present litigation.

There is no evidence that at the time when the latter bonds were given, the bankruptcy, failure or stoppage of *Todd*, was contemplated by *Todd* or by *Deflinne*, and *Todd* did not then stop payment, but continued to carry on his business until some time after April, 1842.

A fiat in bankruptcy, bearing date the 28th day of July, 1842, issued against *Todd*, whereunder he has been duly adjudged and declared a bankrupt, and *Henry Pope* and *Joseph Smith* were appointed creditors' assignees, and *John Fraser* has been appointed official assignee under the fiat.

The act of bankruptcy appearing on the proceedings is an assignment by *Todd* for the benefit of his creditors, dated the 9th day of June, 1842.

On the 23rd September, 1842, *J. Wood* attended a meeting before the Commissioner then acting in the prosecution of the fiat, for the purpose of proving for the sum of 3000*l.*, with interest from the 1st January, 1842, upon the bond executed by *Deflinne* and *Todd* to

1844. *J. Wood.* The proof was resisted by the assignees, and  
 In the matter of *Todd,* after several meetings, at which *J. Wood, Deflinne,* and  
 the bankrupt and other persons, were examined, the proof  
 was rejected by Mr. Commissioner *Jemmett.*

On the 7th of April, 1843, *J. Wood* presented his petition to the Court of Review, praying that the rejection of the proof might be reversed, and that he might be allowed to go in under the fiat and prove for the said sum of 3000*l.* and interest.

The following questions, among others, were raised and insisted on by the assignees of the bankrupt in the Court of Review, in opposition to the petition, viz.:

First. That the advances made to *Deflinne* by his uncles, *T. and J. Wood,* were originally made by them as gifts, and not as loans.

Second. That the partnership between *Todd* and *Deflinne,* though dissolved as between themselves, was not dissolved with sufficient notoriety to prevent *Deflinne* from being liable for the debts contracted by *Todd* after the time of the dissolution.

Evidence was adduced by both parties on these questions, but the Chief Judge on the hearing of the petition decided that neither of these questions was material, and proceeding upon the other facts of the case, he reversed the decision of the Commissioner, and ordered that the debt should be admitted to proof.

The questions are:

Whether under the circumstances above stated, the decision of the Chief Judge as to the immateriality of the two above mentioned questions or either of them is right?

And whether the order of the Chief Judge, admitting the debt to proof, is right?



Mr. *Rolt* and Mr. *Woolrych* for the appellants, the assignees. The substance of the case is, that the respondent claims under *Deflinne*. It is true that the bond to *Deflinne* was cancelled, upon a fresh bond being given to the respondent, but that was merely the form of the transaction; substantially, that debt which *Todd* owed to *Deflinne* has been transferred to the respondent and his brother,—and as volunteers, for it is not found that there was any consideration passing from them to *Deflinne*. In this state of circumstances, their right can be no higher than that which *Deflinne* himself would have. Now as the Court of Review declined finding two of the questions of fact raised, on the ground that they are immaterial, we are at liberty to assume them to be proved in the way most beneficial to us. On this assumption, it is clear that *Deflinne* himself could not have proved against his partner's estate, and it follows, that these volunteers, who claim under him, ought not to have been admitted to prove. They cited *Ex parte Ellis* (a), *Lush v. Wilkinson* (b), *Kidney v. Coussmaker* (c), *Holloway v. Millard* (d), *Richardson v. Smallwood* (e), *Townsend v. Westmacott* (f).

1844.  
In the matter of  
Todd.

Mr. *Russell* and Mr. *Bacon* for the respondents. The fallacy of the argument on the other side consists in treating what was given up, as a right of proof. It is said *Deflinne* could not have proved, and that therefore he could not by any means procure for the appellants a right of proof. But, at the time of the transaction, it was a debt,—it was not a right of proof, for there had been no bankruptcy. Besides, the partnership was at an end,

(a) 2 G. & J. 312.

(b) 5 Ves. 384.

(c) 12 Ves. 154.

(d) 1 Mad. 414.

(e) Jacob, 552.

(f) 2 Bea. 340.

1844.  
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 In the matter of  
 Todd

at the utmost there was a continuation of the joint liability, not a continuation of the partnership. But even admitting that a party who merely remains jointly liable with another, cannot prove against the estate of the latter in competition with the creditors, still that proposition does not affect this case; because, here the party proving is not so liable. The omission to advertise the dissolution, assuming it to exist, could not produce any such effect as that.

Mr. *Rolt* in reply.

LORD CHANCELLOR.—For the purpose of the present argument, the facts which the Chief Judge has considered immaterial and has not found, must be assumed to have been, as will be most in the appellant's favor. On that assumption, the case resolves itself into a very simple shape and form. Mr. *Deflinne*, when he went into partnership, brought in capital amounting to 7000*l.*, which had been furnished to him by his uncles; 3000*l.* by one, and 4000*l.* by the other. The partnership was dissolved by agreement, and it was settled that as between the partners, Mr. *Deflinne* was entitled to 8000*l.*, and 1175*l.* as a creditor of the partnership. The 8000*l.* was secured by a bond of the continuing partner, who paid the 1175*l.* and one instalment of the bond, and the debt was thus reduced to 7000*l.* A new agreement was then entered into, under which the bond from *Todd* to *Deflinne* was cancelled, and two joint and several bonds were executed, in which *Deflinne* joined, one to one uncle for 3000*l.*, the other to the other uncle for 4000*l.* It is impossible to dispute that there was a valid consideration for those bonds. Whether it proceeded

from the uncles or from *Deflinne* is immaterial. It was a valid consideration. The uncles held the bonds, supported by a valid agreement, good in point of law, from that moment as separate creditors of *Todd*. What reason is there why they should not prove? It is said the bonds were voluntary. But the question is not whether they were voluntary as between *Todd* and the Messrs. *Wood*, that is wholly immaterial; but whether there was a consideration from *Deflinne* to *Todd*. I think the release of *Todd* from his liability was a benefit sufficient to support the bond, and that this appeal must be dismissed with costs.

1844.

In the matter of  
Todd.

Ex parte HAMMOND.—In the matter of  
HAMMOND.

THIS was a petition to annul the fiat for want of trading, that relied upon being the trade of a "market gardener," under 5 & 6 *Vict. c. 122, s. 10*.

In support of the fiat witnesses deposed that for four or five years past the bankrupt, who had a farm of 130 acres at Upminster, in Essex, on lease, had grown 11 or 12 acres of young potatoes and about 20 acres of green peas in open fields, and that during the season his men went up to London every night for three weeks at a time, to consign the peas and potatoes to salesmen in London for table consumption; and two salesmen, to whom such consignments had been made by the bankrupt, stated that they were allowed by him the same commission as by other market gardeners.

Dec. 16.

A tenant of 130 acres, under a farming lease, which obliges him to fallow or plant with peas or potatoes (among other things) every third year, has on his farm 12 acres of young potatoes and 20 acres of green peas growing in open fields every year, and consigns the produce for table consumption to London salesmen, to whom he allows such commission as is usually allowed by market

gardeners. *Held*, that he was not a market gardener within 5 & 6 *Vict. c. 122, s. 10*.

1844.  
Ex parte  
HAMMOND.

It appeared that the lease, under which the bankrupt held his farm, was a farming lease of the usual form, and contained a covenant that the tenant should not take off the arable land more than two crops of corn successively, but should fallow the land or plant it with peas or potatoes, or other green crops, particularly specified, every third year. It appeared also to be the custom of farmers in the neighbourhood to sow with peas or potatoes instead of fallowing, and to send the produce to salesmen in London. The bankrupt had the word "farmer" painted after his name on his carts, and, in that character, was assessed to the income tax, and was exempted from duty on his horse and chaise.

Mr. *Anderdon* and Mr. *Rolt*, in support of the petition, cited *Patten v. Brown (a)*.

Mr. *Russell* and Mr. *Chandless* for the petitioning creditor.

Mr. *Glasse* for the assignees.

The CHIEF JUDGE.—Although there may be some difficulty in defining the term market gardener, it must be often easy to say that a man is not a market gardener. I am satisfied that the petitioner was a farmer, and that he was not a market gardener, within any just or reasonable construction of the act of parliament.

Fiat ordered to be annulled.

(a) 7 Taunt. 409.

1844.

**Ex parte ROBERT GARNETT.—In the matter of  
ROBERT GARNETT.**

*Lincoln's Inn,  
December 16.*

**THIS** was the petition of the bankrupt to have the fiat annulled, on the ground that the petitioner had been discharged under the provisions of the act for the relief of insolvent debtors as to the debts mentioned in his schedule, which comprehended those of the petitioning creditors.

Non surrender by the bankrupt is no objection to his petition to annul the fiat, if the petition be presented before the time for surrendering has expired.

The petition to be discharged under the Insolvent Debtors' Act was filed on the 18th of September, 1843, and the vesting order was dated on the 19th of September, 1843.

The circumstances that the bankrupt has taken the benefit of the Insolvent Debtors' Act, and that the petitioning creditor's debt was included in the schedule, held insufficient grounds for annulling the fiat.

The prisoner was brought up for hearing before the Court for the Relief of Insolvent Debtors on the 27th of October, 1843, and after being remanded was discharged on the 22d of February, 1844.

The fiat issued on the 10th of August following, and notice of the adjudication was served on the bankrupt on the 14th.

The petitioner deposed that the whole of his household furniture and effects had been sold under the fiat, and produced only 23*l.* 10*s.* 8*d.*, and that this amount was insufficient to pay the petitioner's debts, contracted since his discharge under the Insolvent Act.

The petition further alleged, that the petitioning creditors' debts were insufficient, and that the fiat was equitably invalid, the act of bankruptcy relied upon being a composition deed, in which the petitioning creditors had, as it was alleged, acquiesced.

*Mr. Swanston* in support of the petition.

1844.  
  
*Ex parte*  
 GARNETT.

Mr. *Bacon*, for the assignees, took a preliminary objection, that the bankrupt had not surrendered. It appeared, however, that the time for the bankrupt's surrender had not expired when the petition was presented, whereupon,

The COURT held that, as the bankrupt was in no default when the petition was presented, the matter ought to proceed.

Mr. *Swanston* in support of the petition. This case comes within the rule, that a fiat ought to be annulled if it can produce no beneficial result. By the 1 & 2 *Vict.* c. 110, s. 39 (a), the whole of the petitioner's property is conclusively vested in the assignee under the Insolvent Act, and there is nothing to administer under the fiat. And although in *Ex parte Barrington* (b), which may

(a) 1 & 2 *Vict.* c. 110, s. 39. "That the filing of the petition of every person in actual custody, who shall be subject to the laws concerning bankrupts, and who shall apply by petition to the said Court for his discharge from custody according to this act, shall be accounted and adjudged an act of bankruptcy issuing against such person, and under which he shall be declared bankrupt before the time appointed by the said Court, and advertised in the London Gazette, for such prisoner to be brought up to be dealt with according to this act, or at any time within two calendar months from the time of making any such order as aforesaid, whether upon the petition of such prisoner, or the petition of any such creditor as aforesaid, shall have the effect of divesting the said real and personal estate and effects of such person out of the said provisional assignee: Provided always, that the filing of such petition shall not be deemed an act of bankruptcy, unless such person be so declared bankrupt before the time so advertised as aforesaid, or within such two calendar months as aforesaid, but that every such order as aforesaid shall be good and valid, notwithstanding any fiat in bankruptcy under which such person shall be declared bankrupt, after the time so advertised as aforesaid, and after the expiration of such two calendar months as aforesaid."

(b) 2 M. & A. 255.

be cited against us, the Lords Commissioners declined to annul the fiat under circumstances somewhat similar to those of this case, yet in that case the 13th section of 7 Geo. 4, c. 57, s. 13 (a), which was the provision then in force, was not called to the attention of the Court, and even if it had been, the present case may be decided in our favour, without disputing a single proposition laid down or involved in the decision in *Ex parte Barrington*, for the act of bankruptcy there was materially different from that on which this fiat is issued; and, moreover, the 1 & 2 Vict. c. 110, varies in many respects the provisions of the 7 Geo. 4, c. 57, and differs from the last mentioned statute in its scope and intention, which are evidently to make a final arrangement between debtor and creditor. [The *Chief Judge*. The 1 & 2 Vict. c. 110, s. 39, and the 7 Geo. 4, c. 57, s. 13, do not appear materially to differ as to the argument to be derived from the latter part of those clauses.] In *Ex parte*

1844.

Ex parte  
GARNETT.

(a) 7 Geo. 4, c. 57, s. 13. "That the filing of the petition of every person in actual custody, who shall be subject to the laws concerning bankrupts, and who shall apply by petition to the said Court for his or her discharge from custody, according to this act, shall be accounted and adjudged an act of bankruptcy from the time of filing such petition, and that any commission issuing against such person, and under which he or she shall be declared bankrupt before the time appointed by the said Court, and advertised in the London Gazette for hearing the matters of such petition, or at any time within two calendar months from the time of filing such petition, shall have effect to avoid any conveyance and assignment of the estate and effects of such person, which shall have been made in pursuance of the provisions of this act: Provided always, that the filing of such petition shall not be deemed an act of bankruptcy, unless such person be so declared a bankrupt before the time so advertised as aforesaid, or within such two calendar months as aforesaid, but that every such conveyance and assignment shall be good and valid, notwithstanding any commission of bankrupt under which such person shall be declared bankrupt after the time so advertised as aforesaid, and after the expiration of two such calendar months as aforesaid.

1844.

Ex parte  
GARNETT.

*Shuttleworth* (a), Sir *J. Leach* said, "It is a matter of serious doubt, whether in a case where there is no property but what might be properly administered under the insolvent law, without calling in aid the more extensive powers of a commission to stand, if there be reason to think it has been issued wantonly and without an adequate object, and by one who might have had the benefit of the assignment in the insolvency. I am inclined to think that, under such circumstances, the Court would restrain a commission unnecessary in itself and productive of unnecessary expense."

Mr. *Bacon*, in support of the fiat, was stopped by the Court.

THE CHIEF JUDGE.—I am of opinion that the petitioner should be left to try the legal validity of the fiat at law, if he think fit to do so. With respect to the argument that there is no property to be administered under the fiat, it would, I think, be unsafe, under the circumstances of this case, to hold, that on that ground, the fiat should not proceed. No judicial decision has been cited to the effect that, supposing this fiat to be valid, the assignees under it would not be entitled to recover the property in the hands of the assignee under the act for the relief of insolvent debtors. No such decision has been mentioned. I give no opinion on the point; but intimating nothing upon the subject, I do not think that I ought to annul this fiat, on the ground that such a recovery cannot take place. The petition must stand over, with liberty for the petitioner to bring such action as he may

(a) 2 G. & J. 68.



be advised, within three weeks, and to mention on Saturday what admissions he wishes to have made.

1844.

Ex parte  
GARNETT.

The petition was afterwards, by consent, dismissed with costs.

In the matter of JOHN WOODHEAD.

MR. HEADLAM moved that the fiat in this case might be amended as to the description of the bankrupt. The description was, "*John Woodhead*, of Todmorden, in the county of York, shoemaker and clogger." Todmorden is a parish partly in the county of York and partly in the county of Lancaster, and the bankrupt's shop was in the latter county. Under those circumstances the Commissioner declined proceeding under the fiat.

December 18.  
Description of a bankrupt as of a particular parish in a particular county, held sufficient, although the parish was partly in that county and partly in another, and the bankrupt's shop was in the other; an affidavit being produced of there being no other person of the same name and trade in the parish.

The CHIEF JUDGE.—I consider the description sufficient, if there is no other person of the same name and trade in the parish, and on an affidavit being produced to that effect, I think that I may order the fiat to be proceeded with.

1844.



In the matter of THOMAS GALES, WILLIAM JOHN GUEST, JOHN FOSTER NAISBY, and MATTHEW KIRBY.

Before the Lord  
Chancellor,  
January 16 and  
December 20.

## SPECIAL CASE.

An agreement is entered into for the sale of a ship at sea, when she should arrive at her port of discharge, for 4000*l.*, and that within one month after her arrival, or such further time as should be necessary for repairs and discharging the cargo, the purchaser should on the execution of a bill of sale to him of the vessel, deliver promissory notes for the purchase money, in default whereof the vendor was to be at liberty to resell, and the purchaser was, within a month after the resale, to pay the loss occasioned thereby; and if the ship was lost, the agreement was to be void.

The purchaser becomes bankrupt before the ship arrives, and on the assignees declining to complete the contract, the vendor resells. *Held*, that he could not prove for the loss occasioned by the resale.

THIS was an appeal from the decision of the Court of Review in *Ex parte Harrison*, reported in 3 Mont. Dea. & De G. 356, where the facts of the case are stated.

Mr. *Russell* and Mr. *F. Bayley* for the appellants, the assignees, contended, first, that the contract was void for want of compliance with the Ship Registry Act; next, that there was no debt, but only a claim for unliquidated damages, which could not be the subject of proof. As to the latter point, the case was decided by the Court of Review, on the ground that the bankrupt had contracted to pay a certain sum of money, and that a contract to pay a certain sum of money constitutes a debt (*a*).

The latter of these propositions is, however, subject to qualification, for a promise to pay a certain sum upon an executory consideration, will not constitute a debt so long as the consideration remains executory. While there remains a possibility of the consideration failing, there is no debt.

Lord *Coke* says (*b*), "If a man by deed doth covenant to build a house or make an estate, and before covenant broken, the covenantee release to him all actions, suits

(*a*) From the course which the case took in the Court of Review, the judgment was very shortly given, and the grounds of the decision were not stated in detail. They are, however, fully set forth in the note of the case in the Chief Judge's note-book, which his Honor has kindly communicated to the reporters. *See post, Appendix.*

(*b*) Co. Lit. 292 b.

and quarrels; this doth not discharge the covenant itself, because at the time of the release, *nihil fuit debitum*."

1844.


In the matter of  
GALES  
and others.

In *Waters v. Glossop* (a), the defendant, in consideration that the plaintiff would forbear to arrest the defendant's son until after October 23rd, promised to pay the son's debt on a balance of account to be stated on or before October 23rd; the plaintiff had a verdict in an action of *assumpsit*, and it was moved in arrest of judgment that the consideration was not good. The Court decided that it was good, but upon the ground that the defendant had till the last instant of October 23rd to pay, and the next instant the plaintiff would have performed his part, for he was not bound to forbear more than one instant after October 23rd. This shows the opinion of the Court to have been, that an executory consideration would not support a promise to pay while it remained executory.

So in *Thorpe v. Thorpe* (b), a mortgagee agreed to pay the mortgagor 7*l*. for a release of the equity of redemption; the mortgagor executed a release, and brought indebitatus assumpsit for 7*l*. Defendant pleaded that the plaintiff, after the promise, released all actions and demands to defendant, and upon oyer of the release it appeared that it contained not only a release of the equity of redemption, but of all actions, suits, causes, accounts, reckonings, sums of money and demands, which plaintiff at any time had, &c. Plaintiff demurred, and obtained judgment in the Court of Common Pleas, and on error, judgment was affirmed, because the plaintiff was not entitled to bring any action against defendant upon this contract, there having been no breach by defendant, and per *Holt*, C. J., "there not *being any duty or demand* before the release was executed, the

(a) *Ld. Raym.* 357.

(b) *Ld. Raym.* 662.

1844.  
  
 In the matter of  
 GALEX  
 and others.

release cannot operate upon it," for "until the release was executed nothing was due, and therefore nothing could be released."

But it is not necessary to contend for the broad proposition, that a promise to pay, founded upon an executory consideration, will not constitute a debt, whilst the consideration remains executory. It is sufficient to show, that upon a contract to purchase, the price to be paid does not constitute a debt, *until the property in the thing agreed to be sold vests in the purchaser.*

Upon a contract to purchase real estate, the estate by force of the contract vests in equity in the purchaser, and the price vests in the vendor. The vendor is a trustee of the estate for the purchaser. The purchaser is a trustee of the price for the vendor. The purchase money, though in the hands of the purchaser, is the property of the vendor, and constitutes a debt. The purchaser is by force of the contract so completely owner of the estate in equity, that he may mortgage it and charge it with judgments, and such incumbrances will be valid as against all persons claiming under him; *Baldwin v. Belcher* (a). But so long as the property remains in the vendor, the purchase money can in no sense be said to be the property of the vendor, or to constitute a debt.

If this had been an unconditional sale, and there had been no question upon the Registry Acts, the price would have constituted a debt, because the property would have vested in the purchaser. But a contract to sell upon a contingency, vests in the purchaser no interest in the thing sold till the contingency happens. In all cases in which proof has been allowed in respect of a contract to purchase, the property had vested in purchaser before commission issued. This remark applies to

(a) Jones & Latouche, 18.

the cases of *Bowles v. Rogers* (a), *Ex parte Hunter* (b),  
*Ex parte Moffatt* (c).

1844.

In the matter of  
GALES  
and others.

There is no form of action in which the vendor can recover the price of the thing sold, without proving that the property in the thing sold has passed to the vendee. The vendor of a personal chattel brings his action either on a special contract of sale, or for goods sold and delivered, or for goods bargained and sold. In the first form of action, on a special count for not accepting goods, the plaintiff can only recover the damages proved to have been sustained. In the second, he must prove delivery of the goods. In the third, he must show that the property in the goods has passed to the vendee. A count for goods bargained and sold can only be maintained where the property in the goods has passed from the plaintiff to the defendant (d).

If upon a contract of sale, the property in the thing sold did not vest in the purchaser simultaneously with the vesting of the right to the price in the vendor, the consequence would be that there might be a moment, when one of them would be owner of both, and the other of neither. Where, after a contract of sale, and before actual delivery to vendee, the thing sold is destroyed, the question upon which of the parties the loss shall fall, is always treated as depending upon the question whether the property in the thing sold had or had not vested in the purchaser. If it had, the right to the purchase money had vested in the vendor, and was unaffected by the destruction of the things sold. *Noy's Maxims*, 88, cited 7 *East*, 571; *Rugg v. Minet* (e). In *Bishop v. Crawshaw* (f), the Court of King's Bench

(a) 6 Ves. 95, n.

(b) 6 Ves. 34.

(c) 2 M. D. & D. 270.

(d) Per Tindal, C. J., *Elliot v. Pybus*, 10 Bing. 516.

(e) 11 *East*, 217.

(f) 3 B. & C. 415.

1844.  
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 In the matter of  
 GALE  
 and others.

considered the vesting of the property in the purchaser as the criterion by which to determine whether the purchaser was a debtor to the vendor for the price or not. *Boorman v. Nash*(a) is in no material circumstance distinguishable from this. There the defendant had agreed to purchase of plaintiff a certain quantity of oil at a certain price per ton, to be delivered at a future day and paid for on delivery. Before the time appointed for delivery the defendant became bankrupt, and his assignees having refused to accept the oil, the plaintiff resold it at a loss, and sued defendant for the difference. *Nash* pleaded his bankruptcy and certificate, and the question was, whether plaintiff could have proved under the commission.

Now if in that case the price agreed to be paid constituted a debt, *Boorman* would have been in the ordinary situation of a creditor with a security for his debt, entitled to realize his security, and to prove for deficiency, and the certificate would have been a bar to the action. But it was held that the plaintiff had no right to prove under the commission, and that the certificate was no bar. That case was argued by Mr. Baron *Alderson*, a short time before he was raised to the bench, for the plaintiff, and by Sir *W. W. Follett* for defendant, and it appears to have been considered by the counsel on both sides, and by the Court, that upon a contract to purchase, the price agreed to be paid does not constitute a debt until the property in the thing sold vests in the purchaser.

*Boorman v. Nash* (b) is therefore an express authority for the proposition, that upon a contract to purchase, and to pay the purchase money, the price agreed to be paid does not constitute a debt until the property in the thing sold vests in purchaser. *Green v. Bicknell* (c) is to the same effect. The only difference between *Boorman v.*

(a) 9 B. & C. 145.

(b) 4 Bing. 722.

(c) 8 Ad. & Ell. 701.

*Nash* and this case is, that here the subject of sale was a specific chattel, and in *Boorman v. Nash* it was not; but that difference is immaterial. The material circumstance in *Boorman v. Nash* was, that the property in the goods sold was not vested in the purchaser, and that circumstance exists here.

1844.

In the matter of  
*Gales*  
and others.

It is impossible to hold that the property in this ship was vested in *Gales* when the fiat issued. It was a contract to purchase as and when the ship should arrive, that is, a contract to purchase on a contingency, and till the contingency happened, the property could not vest in the purchaser. Therefore, independently of any question upon the Registry Act, the property could not vest. But the Registry Act would prevent the property from passing, if it would otherwise have passed.

If the price agreed to be paid for the ship did not constitute a debt, then *Harrison* never had more than a demand for damages, and such demand did not arise until after the fiat. When the fiat issued, *Harrison* had a right to hold *Gales* to his contract, and he had a possibility of a demand for damages, in the event of the contract being broken.

The bankrupt had, when the fiat issued, incurred a contingent liability for damages, but no debt. On the other hand, *Harrison* had a right to enforce an executory agreement and nothing more.

The general rule is, that a demand for unliquidated damages in respect of a breach of contract does not constitute a debt, and that there can be no proof in respect of such a demand. In this case, as in *Boorman v. Nash*, there arise questions which can only be decided by a jury, for example, the questions whether before the sale sufficient time elapsed for effecting the repairs, and the discharge of the cargo, and whether a prudent course

1844. had been taken in the time, mode and conduct of the  
 In the matter of sale.

GALES  
 and others.

To this rule, an exception has been established in case of contracts to transfer stock, it being considered that the amount of damage arising from a breach of such a contract, is mere matter of calculation, capable of being ascertained without the intervention of a jury. But there can be no proof upon a contract to transfer stock, unless such contract were broken before fiat issued. Therefore, even admitting in this case that the amount of damage arising from the breach of contract, is mere matter of calculation, capable of being ascertained without the intervention of a jury, yet as there was no breach of contract before the fiat issued, there can be no proof; *Utterson v. Vernon* (a), *Ex parte King* (b), *Ex parte Campbell* (c), *Parker v. Ramsbottom* (d). They also referred to *Gibson v. Carruthers* (e).

Mr. *Bacon* for the respondent. The provisions of the Registry Act only apply to an actual transfer of the property, and not to a mere contract for a sale. [*Lord Chancellor*. The other side argue, that if the property was intended to pass, the contract was void by the Registry Act, and if no property was intended to pass, there is no debt.] They have not established the latter of these propositions. There is no difference in principle, as regards the question in dispute, between this contract and a contract to sell an estate; the legal estate is not intended to pass in either case, but the purchase money becomes a debt; the express agreement

(a) 4 T. R. 570.

(b) 8 Ves. 334.

(c) 16 Ves. .

(d) 3 B. & C. 257.

(e) 8 M. & W. 342.



here, that the ship should be a security for the price, takes away the only difference which there would otherwise be between the two cases. The circumstance of the agreement being conditional is relied upon by the appellants, but such agreements are often entered into for the sale of estates; a common instance being that of a contract to sell at a given price, if a railway bill should pass. If the assignees had been desirous of completing the agreement, they might have registered the agreement, and enforced a specific performance. An injunction might have been obtained, to restrain the owner from otherwise disposing of the vessel.

The argument, that we seek to prove for unliquidated damages, would apply equally to a contract to sell an estate, for there, as in this case, the questions as to the propriety of the sale, and the charges for repairs and other expenses would exist, but these questions have never been held sufficient to prevent proof being admitted for the balance of the purchase money; *Ex parte Hunter* (a), *Ex parte Seaforth* (b), *Bowles v. Rogers* (c), *Ex parte Gyde* (d). [Lord Chancellor. At what period do you say there was a debt?] At the time of the contract; a contingent debt, I admit, but the contingency having happened before the proof was tendered, though after the bankruptcy, the demand is proveable under the provisions of the latter part of the 56th section of 6 Geo. 4, c. 16 (e).

1844.

In the matter of  
GALES  
and others.

(a) 6 Ves. 94.

(c) C. B. L. 146.

(b) 1 Ro. 306.

(d) 1 G. & J. 323.

(e) " And be it enacted, That if any bankrupt shall before the issuing of the commission have contracted any debt payable upon a contingency, which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the Commissioners to set a value upon such debt, and the Commissioners are

1844. *Mr. F. Bayley* in reply. The difference between the sale of a ship and the sale of an estate is, that, in the former case, the legislature has said in the Registry Act, that there shall be no equitable interest distinct from the legal title, whereas in the latter, the authorities refused to proceed entirely upon the principle of the legal and equitable property being in different persons between the time of the contract being entered into and the time of its fulfilment. As to the argument founded on the 56th section of the 6 *Geo.* 4, c. 16, it is clear from the context that the latter part of the section refers to and comprehends only the contingencies contemplated by the former part, that is to say, such contingencies as are capable of valuation, a description which does not apply here.

*December 20.*

LORD CHANCELLOR.—In January, 1842, *T. Harrison* was the owner of the ship *Salsette*, then at sea. *T. Gales*, by agreement in writing dated 11th January, agreed to purchase the ship for 4000*l.*, on terms which were in effect as follows, i. e. *Gales* agreed to purchase of *Harrison* the ship, &c., as and when she might arrive at her port of discharge, for the price of 4000*l.*, to be paid and payable as after mentioned. *Harrison* was to have the benefit of the use of the ship until her arrival, and after her arrival, a month, or further time if required, was given for discharging the cargo and making the repairs which were stipulated for. On the expiration of the time thus

hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon, or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends, provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed.

given, *Gales* (on the execution of a bill of sale) was to give *Harrison* two promissory notes, each for 2000*l.*, one payable on the 10th of October, the other on the 10th January following, and *Harrison* was to convey the ship to *Gales*. If *Gales* did not give the notes at the time, *Harrison* might sell and apply the money in payment of the purchase money. The sale was to be considered as made by and with the privity of *Gales*, and he was to make good the deficiency. And the agreement was to cease and become void if the ship was lost, and thereby prevented from arriving.

In February, 1842, *Gales* and his partner became bankrupt.

On 27th March, 1842, the ship arrived at her port of discharge. The attornies of *Harrison* (who had gone abroad) gave notice to the assignees of the separate estate of *Gales*; and the assignees having declined to perform the agreement, the attornies of *Harrison* sold the ship for a sum, which, after paying expenses, amounted to 2833*l.* 10*s.* 8*d.*, being less than 4000*l.*, the stipulated price of the ship, by the sum of 1166*l.* 9*s.* 4*d.* On 6th February, 1843, the attornies of *Harrison* claimed to prove this sum of 1166*l.* 9*s.* 4*d.*, as a debt against the separate estate of *Gales*.

The proof was rejected by the Commissioner, and the case states that the only objection made and argued was, that *Harrison*, the vendor, had only a contingent claim for unliquidated damages, and that, even if he had any claim of debt, the claim was merely contingent; and contingent in such a manner, that it could not become the subject of proof under the fiat.

The attornies of *Harrison* presented their petition to the Chief Judge of the Court of Review, praying for a

1844.

In the matter of  
*GALES*  
and others.

1844.  
  
 In the matter of  
*GALES*  
 and others.

declaration that they had a right to prove, and for consequential relief, and his Honor by his Order, dated the 29th of July, 1843, ordered that the petitioners should be at liberty to go before the Commissioner, and prove against the separate estate of *Gales* for the sum of 1166*l.* 9*s.* 4*d.*, and be paid a dividend thereon rateably with the other separate creditors of *Gales*.

It is admitted, that at the time of the decision of the Court of Review, the articles of agreement of the 11th of January, 1842, had never been produced to the collector and comptroller of the port at which the ship was registered, or at any other port, and that there had not been any entry made of or touching the agreement, or any of the matters thereof, by any such collector or comptroller, or any other officer of customs.

To the proof it is objected:

First, That the contract was invalid, by reason of the articles not reciting the certificate of registry of the ship, and of the articles not having been produced and registered pursuant to the statute of 3 & 4 *Will.* 4.

Secondly, That assuming the contract to be valid, there was not at the date of the fiat a proveable debt under it.

It will not, in the view which I take of the case, be necessary to consider the question arising on the Registry Act.

The agreement was to purchase the ship, &c., as and when she should arrive in port.

In the meantime no consideration passed, no transfer was made or intended to be made, and no payment was to be made or secured.

After the arrival of the ship, the discharge of the cargo, and repairing, and not before, the price was to be paid (or secured) by promissory notes, and the ship was to be transferred.

In the meantime, and therefore at the date of the fiat, the property in the ship remained in the vendor, who stipulated to have the benefit arising from the use of it, and the vendee was under no obligation to pay, or to give any security for payment.

1844.  
In the matter of  
GALES  
and others.

The transaction, as respects the bankrupt, was, in effect and substance, a mere agreement on his part to purchase the vessel at a future period for a given sum, in the event of her safe arrival in England.

She did not arrive till after the bankruptcy and the issuing of the fiat. No debt was created in the meantime, but for any breach of the agreement after the arrival of the vessel, the vendor would be entitled to recover damages from the vendee, or to sell the vessel, and claim to be paid the difference between 4000*l.*, the stipulated price, and the sum she might bring on the sale, being a mode of estimating the damages reserved to the vendor.

The orders must therefore be discharged.

Ex parte ROWE.—In the matter of ROWE.

Westminster,  
January 22,  
1845.

THIS was the petition of the bankrupt, to set aside the choice of a creditors' assignee, on the ground that the persons whose votes had carried the choice were not creditors entitled to vote.

The bankrupt with four other persons had been elected

Where one of several trustees of a charitable society became bankrupt, and his co-trustees tendered a proof for the amount due from him to the charity, and on the Commis-

sioner refusing to admit the proof without an order of the Court, an order was obtained, and the debt proved by the co-trustees in pursuance thereof. *Held*, that the co-trustees were not creditors entitled to vote at the choice of a creditors' assignee, and, they having been the only persons voting, the choice was set aside, and a new one directed.

1845.

Ex parte  
Rowe.

provisional trustees of a charitable society called "The Society for Aged and Decayed Freemasons," and various sums of money, amounting in the whole to 1200*l.* consols, were invested in their names. In May, 1838, one of the trustees died, and a new trustee was elected in his room, and sums of money, amounting to 800*l.* consols, were afterwards invested in the names of the then trustees. The former fund, however, was never transferred, but still stood in the names of the four survivors of the original trustees. In January and July, 1840, the bankrupt, as trustee, took upon himself to receive the dividends upon the sums of stock, and invested the dividends in the purchase of 66*l.* 1*s.* consols in the names of himself and his co-trustees. From July, 1840, to July, 1843, inclusive, the bankrupt continued to receive the dividends on the original sums of stock, to the amount of 188*l.* 18*s.* 2*d.*, after deducting the income tax, and also received from the administrators of one *William Sansum* 120*l.* 7*s.* 8*d.*, which belonged to the charity.

The fiat issued the 7th of October, and a meeting for the choice of assignees was advertized for the 23rd day of October. The solicitor to the charity attended on that day, with the treasurer and one of the trustees of the charity, and, at first, applied to prove the debt as one due to the treasurer; but on the Commissioner expressing his opinion that the proof should be made in the names of the trustees, and not of the treasurer, the solicitor applied to prove in the names of the trustees. The Commissioner, however, decided that as the bankrupt was himself a trustee, the proof could not be allowed without an order of the Court of Review.

In consequence of this decision, the bankrupt's co-trustees presented a petition for leave to prove, and an order was made on the 22nd of November, 1844, that the peti-

tioners or any three of them should be at liberty to go in under the said fiat, and tender and make such an amount of proof or proofs as they could establish against the separate estate of the bankrupt in respect of the debts.

1845.  
Ex parte  
Rown.

On the 22nd of November, 1844, the day appointed for the bankrupt's last examination, and to which the choice of assignees had been adjourned, the bankrupt's co-trustees tendered a proof for 188*l.* 18*s.* 2*d.*, and 120*l.* 7*s.* 8*d.*, when the sum of 188*l.* 18*s.* 2*d.* was admitted to be due to the charity, but the bankrupt denied upon oath that he had ever received 120*l.* 7*s.* 8*d.* The proof was then allowed to the extent of 188*l.* 18*s.* 2*d.*, and adjourned as to the residue for further evidence.

The only other debt proved or attempted to be proved, was one by the solicitor of the bankrupt, who proved for 62*l.* 14*s.* 4*d.* for costs, and he alone objected to the proof of the trustees.

The trustees then voted for one *Z. Watkins* to be creditors' assignee, and no other person being proposed, and no objection being made to the appointment, he was appointed assignee by the Commissioner. The present petition was to have the appointment set aside, and for a new choice.

*Mr. Anderdon* in support of the petition. The order giving the co-trustees liberty to prove, is incorrectly framed, and at all events parties who only prove under an order, are not creditors entitled to vote. [*The Chief Judge* referred to *Howard and Gibbs' case* (a).]

*Mr. Rolt* for the assignees. Although it may be con-

(a) 1 Gl. & J. 151.

1845.

  
Ex parte  
Rowe.

ceded, that where the order of the court creates the debt on which proof is made, the proof does not entitle the party proving to vote, yet the case is different where the debt does not originate in, but exists independently of the order of the Court, and that order is only obtained to remove a technical difficulty. [The *Chief Judge*. Could *B.* and *C.* go in and prove a debt due from *A.* to *A. B.* and *C.*?] It would be a debt in equity, if there were no bankruptcy, and a debt which there would be no difficulty in enforcing. And, as equitable debts are proveable, the Commissioner ought to have admitted the proof without an order, and at all events his having obliged us to come here for an order to remove what he considered an objection in point of form to the proof, cannot interfere with the right to vote at the choice, which any creditor has—who has proved.

The CHIEF JUDGE.—As I understand it, the law applicable to the choice of a creditors' assignee still rests on the 61st section of the act of the 6 *Geo.* 4, which provides that all creditors who have proved debts under the commission to the amount of 10*l.* and upwards shall be entitled to vote. The 46th section, which provides that every creditor may prove his debt by his own oath, shows who are the parties contemplated by the 61st section; and the 61st section also provides, that the choice shall be made by the major part in number and value of the creditors so entitled to vote; a provision, which, before the appointment of official assignees, might have produced some inconvenience, as there might have been no one entitled to vote, if the only proof had been made under an order of the Court,



according to what was said by Lord *Eldon* in *Ex parte Shaw* (a).

The appointment of official assignees may have obviated this inconvenience. However that may be, the persons entitled to vote must be creditors of the bankrupt. In the case of a mortgagee, he is a creditor of the bankrupt, he holds a security; but still he is a creditor.

Mr. *Rolt* has argued, and very fairly, that these gentlemen are creditors. For many and substantial purposes they are creditors, but by bankruptcy a man does not cease to be a trustee; it may be a ground for his removal, but till discharged he remains a trustee. This is the case of a debt due from *A.* to *A. B.* and *C.* I find myself unable to say, having regard to the section, that *B.* and *C.* are creditors of *A.*, and as (for I proceed very much on this ground) no creditor voted except those gentlemen, I must set aside the choice, declaring that as they were the only voters, and had no right to vote, the choice cannot stand, and it must be referred to the Commissioner to have a new choice made.

Ordered accordingly.

(a) 1 G. & J. 151.

1845.

Ex parte  
Rowe.

1845.

*Westminster,  
January 22.*

Where the assets had been sold by the assignee on credit, and part only of the purchase money was paid, which was applied in part payment of the bill of costs of the solicitor to the commission, and after a lapse of several years the assignee was ordered to make good and did make good the remainder of the purchase money out of his own pocket: *Held*, that out of this money so made good, the solicitor was entitled to be paid the remainder of his bill, although it was recovered without his assistance, and although more than six years had elapsed since the date of the most recent item in the bill.

**Ex parte CHARLES BRUTTON.—In the matter of  
JABEZ HENRY FISHER.**

**THIS** was the petition of the solicitor to the fiat, praying for payment of his bill of costs out of a sum in the hands of the official assignee. The petitioner had been solicitor to the petitioning creditor in suing out the commission, and his bill of costs up to the choice had been taxed at 83*l.* by the then Commissioners, who, by an order dated December, 23*d*, 1828, directed the assignee to pay that amount to the petitioner out of the estate. There were at that time, however, no assets realized of sufficient amount to pay the bill, and there being from the nature of the property considerable difficulty in converting it into money, the assignees called a meeting of the creditors, at which the creditors present assented to the assignee disposing of the furniture, stock in trade and effects, in one or more lot or lots, either by private contract at a valuation or appraisement, or by public auction, for ready money or on credit, and with or without security, as he might think proper.

The assignee, in consequence of this resolution, sold the stock in trade for 210*l.* 10*s.*, and took four acceptances of the purchaser for the amount; one of these acceptances only was paid, and the amount was in 1830 paid to the petitioner in part discharge of his bill. The purchaser then became bankrupt, and on May 17, 1831, the assignee of *Fisher's* estate proved the debt due to the estate of *Fisher* under the commission against the purchaser, but no dividend had ever been declared under the latter commission. Dividend meetings were held and adjourned from time to

time. The commission was removed, after the passing of the new act, to the Exeter District Court, and an official assignee was appointed on the 17th of May, 1844. The Commissioner decided that, under the circumstances of the case, the creditors' assignee was responsible for the whole amount of the sum for which he had sold the bankrupt's stock, whether he had received the amount or not; and the Commissioner made an order, dated the 27th day of May, 1844, directing the assignee to pay to the official assignee the sum of 163*l.* 8*s.* 7*d.*, which was found by the Commissioner to be the balance of the proceeds of the bankrupt's stock and effects. This sum was accordingly paid by the creditors' assignee to the official assignee. The petitioner thereupon made out his bill for business done by him as solicitor to the assignee since the taxation of the former bill, and amounting to 97*l.* 7*s.* 11*d.*, which was taxed by the registrar at 88*l.* 19*s.*; but on the petitioner applying to the Commissioner for an order for payment, the Commissioner refused to make the order, on the ground that the assets had been realized without the aid of the petitioner, and that as there was no item of the bill within six years, the petitioner's claim in respect thereof was barred by the statute.

Mr. *Swanston* and Mr. *Bacon* in support of the petition. In *Higgins v. Scott* (a) an attorney was held to have a lien on a judgment for his bill of costs, although he had taken no steps in the cause, or to recover the amount of his bill within six years. They also cited *Ex parte Bryant* (b).

(a) 2 B. &amp; Adol. 413.

(b) 1 Mad. 50.

1845.

Ex parte  
BRUTTON.

1845.

Ex parte  
BRUTTON.

Mr. *Russell* and Mr. *Shapter* for the assignees. The solicitor's claim is against the assignee; he has no lien or claim upon a fund recovered without his interposition, and cannot, at all events, upon this application, enforce any, the creditors' assignee not having been served with the petition, or being in any way before the Court. In *Hodgens v. Kelly* (a), it was decided that a solicitor's lien did not extend to a fund which the client could reach without the assistance of the solicitor, or the use of the papers in his possession. They also cited *Irving v. Vinna* (b).

Mr. *Swanston* in reply was stopped by the Court.

The CHIEF JUDGE.—The 14th section of the act 6 Geo. 4, c. 16, after providing that the Commissioners shall, at the meeting for the choice, direct the assignees (who are thereby required) to reimburse the petitioning creditor his costs out of the first money got in, provides that all bills of costs of any solicitor employed under the commission after the choice shall be paid by the assignees. If the assignees do not pay, the solicitor has a right to come here to enforce the performance of their duty, for duty I consider it to be. The creditors' assignee has paid what the Commissioner charged him with, and I cannot assume that he ought to be charged with more. It is not necessary to say what would have been the result, if there had been a loss to the estate. I am dealing with a case in which there has not been a loss.

(a) 1 Hogan, 588.

(b) 2 Y. & Jer. 70.

This being so, the only sufferer is the solicitor himself, who has been deprived of his money for so many years. I agree that a case may be supposed of such delay as to induce the Court, whether the Statute of Limitations is applicable or not, to refuse to assist the solicitor. But here the delay has been explained to my satisfaction, and does not involve any imputation upon the solicitor. If there is any ground for forming an opinion at all, the delay took place under circumstances rather creditable to his feelings and intentions than otherwise. But whether there was any satisfactory reason for the delay or not, if the debt is honestly due, it ought in the present case to be paid. Unless therefore the assignees require the bill to be taxed, I shall make the order for payment at once. The costs on both sides must come out of the estate.

1845.  
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Ex parte  
BRUTTON.

Ordered accordingly.

Ex parte HUGH GREAVES, ALEXANDER BROWN, RALPH TURNER and THOMAS ASHTON.—In the matter of SIDNEY PRICE.

THIS was the petition of the trustees and one of the public officers of the Commercial Bank of England, who were legal mortgagees of estates belonging to the bankrupt, and had obtained from the Commissioners the usual order for sale. Part of the property comprised in the security had been sold, and the proceeds had been applied towards payment of the debt secured. The re-

February 4.

Where a legal mortgagee had obtained the Commissioner's order for sale of the property comprised in the security, and part of the property had been sold, and the proceeds applied in reduction of the debt, and

the remainder of the property proved unsaleable, the mortgagee was permitted to give up the unsold property and prove for the unpaid portion of his debt.

1845.

Ex parte  
GREAVES  
and others.

mainder of the property had proved hitherto unsaleable. A claim had been admitted for the whole amount of the debt secured.

At a meeting for declaring the final dividend, the petitioners applied to have their claim converted into a proof for the unpaid portion of the debt, offering to give up the unsold portion of the property, but the Commissioner refused the application, on the ground that the petitioners had made their election by obtaining the order for sale, and he was about to expunge the claim and declare a final dividend.

The present petition prayed that the proof might be admitted.

Mr. *Bacon* and Mr. *Little* in support of the petition.

Mr. *Swanston* for the assignees. The petitioner has elected and must abide by the order which he has obtained; *Rome v. Young* (a).

The COURT ordered that, on the petitioners giving up the unsold part of the property, they should be at liberty to go in and prove. Costs of the petition to come out of the proceeds of the sold property.

(a) 4 Y. & C. 204, and see *Ex parte Davenport*, 1 M. D. & D. 313.

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1845.

Ex parte ANTHONY LANCASTER MOLYNEUX,  
JEREMIAH CHAFFERS and JOHN FOLLETT,  
in the matter of CHARLES HUMBERSTON and  
SAMUEL FRODSHAM; and Ex parte THOMAS  
BRANCKER and CHARLES TURNER in the  
same matter.

July 29, 1844,  
reheard  
Feb. 5, 1845.

THESE were two petitions of appeal from the decision of the Commissioner respecting a proof; one of the petitions seeking to increase, and the other to diminish the amount, for which the proof had been admitted.

In November, 1836, the bankrupts *Humberston* and *Frodsham*, who carried on business as commission merchants in partnership at Liverpool, despatched a ship belonging to them, called the *Diamond*, to *Thomas Blayds Molyneux*, a merchant trading at Charleston in America, directing him to purchase for them a certain quantity of cotton, and to ship it on their account on board the ship.

*T. B. Molyneux* accordingly, in April, 1837, purchased and shipped on board the vessel 304 bales of cotton, addressed to *Humberston* and *Frodsham*, the prices and value whereof, together with the charges of shipping and insuring the same, and for commission thereon, amounted to 13,185 dollars and 17 cents of

A vendor of cotton in America, by direction of the purchasers in England, ships the cotton on board a vessel belonging to the latter.

The purchasers become bankrupt, and afterwards the vessel arrives in England and is taken possession of by a mortgagee in right of his mortgage. The mortgagee happens to be a partner in a firm, who are the agents of the vendor, and upon a notice from them claiming a right to stop the cotton in transitu, he permits them to take possession of it. They sell it at a loss, and give their

principal credit in his account for the proceeds.

The vendor becomes bankrupt.

An action of trover for the cotton is commenced against the mortgagee by the purchasers' assignees and is compromised, upon the terms of the purchasers' assignees proving against the estate of the vendor for the amount of the proceeds, for the benefit of the mortgagee, the latter agreeing, in the event of no dividend being paid by a certain day, that judgment for the full amount of the proceeds should be entered up against him in the action.

Proof is made accordingly, but no dividend paid, and the mortgagee pays the full amount of the proceeds of the sale to the purchasers' assignees.

The vendor's assignees then tender a proof for the original price of the cotton against the estate of the purchasers.

Held, that the proof ought to be admitted for the full amount.

1845.

Ex parte  
MOLYNEUX  
and others.

American currency, which was equal to 2742*l.* 13*s.* 3*d.* sterling, and sent the bills of lading for the cotton to *Humberston* and *Frodsham*, who knew and approved of the purchase on their behalf. *T. B. Molyneux* made himself personally liable to pay the vendors of the cotton, and he paid the disbursements of the ship at Charleston, drawing upon *Humberston* and *Frodsham* four bills of exchange for sums amounting together to 3036*l.* 16*s.* 7*d.*, two of which bills were accepted and the other two not.

These bills became due after the bankruptcy of *Humberston* and *Frodsham*, and were not paid.

On the 9th of June, 1837, the fiat issued against *Humberston* and *Frodsham*, and on the 13th June, 1837, the ship with the cotton arrived at Liverpool.

There was a firm of *Molyneux, Taylor & Co.* trading at Liverpool, who had been by a power of attorney, executed by *T. B. Molyneux*, appointed to act in his absence as his attornies and agents. A member of this firm, named *Edmund Molyneux*, claimed to be mortgagee in his own separate right of the ship, and in that character took possession of her on her arrival, and thereupon the firm, of which he was a member, claimed a right to stop the cotton in *transitu*.

On June 14th, 1837, *Molyneux, Taylor & Co.* gave the following notice to the captain of the ship, namely, "To Captain *John Toole* and owners of the *Diamond*, for our Charleston.

"Gentlemen,

"We hereby give you notice, that as agents to Mr. *T. B. Molyneux*, of Charleston, the shipper of 300 bales of cotton, more or less, on board that vessel, not to deliver the said cotton to any other person or persons



than ourselves, as we stop the same in *transitu* on behalf of the said *T. B. Molyneux*, the same not having been paid for.

1845.  
  
 Ex parte  
*MOLYNEUX*  
 and others.

We are, gentlemen, your obedient servants,  
*Molyneux, Taylor & Co."*

The cotton was accordingly seized by *Molyneux, Taylor & Co.*, and was never delivered to or received by *Humberston* and *Frodsham*, or their assignees.

On the 14th of June, 1837, Mr. *Peacock*, the solicitor of the petitioning creditor, wrote and sent to *Molyneux, Taylor & Co.* the following letter :

" Church Street, 14th June, 1837.

" Messrs. *Molyneux, Taylor & Co.*, Chapel Street.

" Gentlemen,

" One of your clerks called upon me yesterday to request that I would direct the master of the *Diamond* to deliver up his papers, to enable you to report her at the customs, but as a question has arisen as to your right to receive the freight, the master is anxious himself to receive it, until it is known who is really entitled to it; under these circumstances, I shall be obliged by referring me to your solicitor, in order that an arrangement may be made to prevent further delay and inconvenience.

I am, gentlemen,

Your very obedient servant,

*John Peacock."*

In answer to such last mentioned letter, *E. Molyneux* wrote as follows :

" 15th of June, 1837.

" Mr. *J. Peacock*, Liverpool,

" Sir,

" Messrs. *Molyneux, Taylor & Co.* having handed to me a note which you addressed to them, I beg to inform you, in reply thereto, that, as mortgagee of the

1845.

Ex parte  
MOLYNEUX  
and others.

*Diamond*, I have taken possession of that vessel and cargo, and I shall myself receive all freights and earnings that either are or may become due thereon, all which I am fully and justly entitled to as mortgagee of the *Diamond*, not having been able yet to meet with the master, *J. Toole*, and being desirous to report the vessel immediately, and as you write as his attorney, I hereby again demand the immediate delivery to me of the ship *Diamond*, register, manifest, bills of lading, and other papers relating to the said ship *Diamond*, and the cargo on board the same.

I remain, &c.

*E. Molyneux.*"

*Molyneux, Taylor & Co.* took possession of the cotton, and in July, August and September, 1837, they sold it, without any notice, and without the consent of the assignees of *Humberston* and *Frodsham*, for 2086*l.* 7*s.* 8*d.*, and entered that amount in their account books to the credit of *T. B. Molyneux*, in his account with them, with his consent, he being at the time indebted to *Molyneux, Taylor & Co.* in a sum of money exceeding 2000*l.*

The assignees of *Humberston* and *Frodsham* insisted that *E. Molyneux* had no right to seize the ship and cargo, and in December, 1839, brought an action of trover for the cotton against *E. Molyneux*.

In September, 1841, a fiat issued against *T. B. Molyneux*. After three trials in the action, and when it was about to be tried for the fourth time, in August, 1842, an agreement was made between the surviving assignee of *Humberston* and *Frodsham*, and *Molyneux, Taylor & Co.*, whereby the plaintiff agreed to withdraw the record and give every facility to prove his claim on the estate of *T. B. Molyneux*, and in case the plaintiff was not paid the full amount of his claim from the dividends on his

proof, or in case no legal proof could be made on or before the 6th of November, 1843, the defendant agreed to withdraw his pleas, and the plaintiff was then to be at liberty and thereby engaged to enter up judgment against defendant for 2086*l.* damages, but without costs, and to levy such sum or so much only thereof as should be not previously paid or received in reduction of such damages.

The assignees of *T. B. Molyneux* did not join in or assent to the agreement. On the 17th August, 1842, the surviving assignee of *Humberston* and *Frodsham* proved against the estate of *T. B. Molyneux* for 2086*l.*, but had not received any dividend upon the proof within the time limited by the agreement.

*Molyneux, Taylor & Co.*, in performance of the agreement, paid this amount to the assignees of *Humberston* and *Frodsham*.

On the 15th May, 1844, the assignees of *T. B. Molyneux* tendered a proof against the estate of *Humberston* and *Frodsham* for 3036*l.* 16*s.* 7*d.*, the amount of the four bills of exchange.

The Commissioner determined that the assignees of *T. B. Molyneux* were entitled to prove for 950*l.* 8*s.* 11*d.*, being the difference between the sum of 3036*l.* 16*s.* 7*d.* and the sum of 2086*l.* 7*s.* 8*d.*, the proceeds of the sale of the cotton (a).

(a) The following was the judgment of the Commissioner (Mr. Serjt. Ludlow):—"In the spring of 1837, the bankrupts, *C. Humberston* and *S. Frodsham*, were owners of the *Diamond*, which was then at Charleston, United States of America, where, in pursuance of their order, Mr. *T. B. Molyneux* purchased and paid for and shipped in the said vessel for the bankrupts, cotton to the amount of 2742*l.* 13*s.* 3*d.* On the 9th June, 1837, a fiat was issued against them; on the 13th June the *Diamond* arrived at Liverpool, and Mr. *E. Molyneux*, who had a mortgage of that ship, took possession of her and of the cargo, and shortly afterwards sold the cotton,

1845.

Ex parte  
MOLYNEUX  
and others.

1845.  
  
 Ex parte  
 MOLYNEUX  
 and others.

The proof for the said sum of 950*l.* 8*s.* 11*d.* was accordingly admitted.

and credited Mr. *T. B. Molyneux* in account with *E. Molyneux* and his partner *Taylor* with the amount of the proceeds, 2086*l.* 7*s.* 8*d.* It does not very clearly appear in what character or right Mr. *E. Molyneux* took possession of the cotton, but inasmuch as *E. Molyneux* and his partner credited Mr. *T. B. Molyneux* with the amount of the proceeds, and he assented to such credit, I think it must be taken that the stoppage of the cotton was made as his agents and on his behalf. An action of trover was brought by the assignees of Messrs. *Humberston* and *Frodsham* against Mr. *E. Molyneux*, which after two or three trials was again standing for trial in August, 1842. In the mean time (namely, 4th September, 1841), *T. B. Molyneux* became bankrupt; on the 11th August, 1842, the following agreement was entered into between the assignees of *Humberston* and *Frodsham* and *E. Molyneux*. (Here follows the memorandum of arrangement of the action *Brancker v. Molyneux*.)

"The stoppage in transitu has been admitted by the acts of all parties not to be valid; by the assignees of *T. B. Molyneux*, by their application to prove their debt; by the assignees of *Humberston* and *Frodsham*, by having proved the debt against *T. B. Molyneux*; and by *E. Molyneux*, by the payment of the 2086*l.* to the assignee of *Humberston* and *Frodsham*. This places *T. B. Molyneux* in the position of a creditor, entitled to prove against the estate of *Humberston* and *Frodsham* for 2742*l.* 13*s.* 3*d.* on the original transaction. The answer to such proof is, that he has already received 2086*l.* 7*s.* 8*d.* from the proceeds of this very cotton. There may be some difficulty as to the proof which has been made by the assignees of *Humberston* and *Frodsham* on the estate of *T. B. Molyneux*, whether it ought to be expunged or to stand for the benefit of *E. Molyneux*, but this is not for me to decide. Upon the question between the assignees of *T. B. Molyneux* and this estate of *Humberston* and *Frodsham*, I think his having received the 2086*l.* 7*s.* 8*d.* must be considered as a payment *pro tanto*, and in reduction of the debt; the proof therefore must be for . . . . . £3742 13 3

|  |      |   |    |
|--|------|---|----|
| Minus the . . . . .  | 2086 | 7 | 8  |
| Amounting to . . . . .   | 656  | 5 | 7  |
| To which must be added, about which no question is made, disbursements . . . . . | 294  | 3 | 4  |
| Making together . . . . .  | £950 | 8 | 11 |

I think it a question of difficulty and of some doubt, and it is quite reasonable that the parties should go to the Court of Review to have my opinion corrected. So far as I may express an opinion as to costs, I should say that it should not be made a question of costs on either side."

From this decision both parties now appealed, the assignees of *T. B. Molyneux* praying that the proof might be increased to the full amount of 3036*l.* 16*s.* 7*d.*, and the assignees of *Humberston* and *Frodsham* praying that the proof so admitted might be expunged, except as to the 294*l.* 3*s.* 4*d.*, the amount of the disbursements of the ship.

1845.  
~  
Ex parte  
MOLYNEUX  
and others.

Mr. *Bacon* and Mr. *Rolt*, in support of the petition of the assignees of *T. B. Molyneux*, cited *Wentworth v. Outhwaite* (a).

Mr. *Swanston* and Mr. *Follett*, for the assignees of *Humberston* and *Frodsham*, cited *Boorman v. Nash* (b), *Bloxam v. Saunders* (c), and *Green v. Bicknell* (d).

**THE CHIEF JUDGE.**—Messrs. *Humberston* and *Frodsham*, who carried on business as merchants at Liverpool, employed Mr. *T. B. Molyneux*, a merchant at Charleston, to buy cotton for them; they sent a vessel, of which, as charterers or owners, they were in possession and had the controul, to receive the cotton when purchased. *T. B. Molyneux* purchased the cotton as directed, and shipped it on board the vessel sent to receive it, so that it would seem that no right of *stoppage* could arise.

*T. B. Molyneux* employed as his agents at Liverpool a firm of *Molyneux, Taylor & Co.* *E. Molyneux* was a member of that firm, and he claimed to be mortgagee of the ship in his own separate right. In order to assist *T. B. Molyneux*, possession was taken of the ship by *E. Molyneux* in his character of mortgagee,

(a) 10 M. & W. 436.  
(b) 9 B. & C. 145.

(c) 4 B. & C. 941.  
(d) 8 Ad. & El. 701.

1845.

Ex parte  
MOLYNEUX  
and others.

and being thus in possession, he procured notice to be served upon him by the firm of which he was a member, claiming the goods by virtue of the title of *T. B. Molyneux*, and by virtue of that title claiming to stop the goods *in transitu*. It is plain that the act of retaining the cargo could be justified, if at all, only as a stoppage *in transitu*, for *E. Molyneux* claimed to be mortgagee of the vessel only. It is clear also, that if *T. B. Molyneux* had a right to stop the goods *in transitu*, the act of *E. Molyneux* in retaining the cargo, upon the notice that was given him, was a justifiable act.

Before this took place, the purchasers had become bankrupt, and the wrong therefore (if any) committed by *E. Molyneux* was done to the assignees of *Humberston* and *Frodsham*, and not to *Humberston* and *Frodsham*.

The assignees brought an action against *E. Molyneux*, which, after various trials with various success, terminated in a compromise, according to the terms of which a sum was to be paid by *E. Molyneux* in respect of the value of the goods seized. This could have only been on the ground that the act of seizure was wrongful, and that there was no right to stop *in transitu*. If that be so, what is there to prevent the vendor from being paid for his goods? A man does not lose a right of proof against a bankrupt because his agent does a wrong to the assignees of the bankrupt.

But it is said that the right of proof is gone, by reason that *Molyneux, Taylor & Co.* gave to *T. B. Molyneux*, and that *T. B. Molyneux* received, credit in their accounts for the proceeds of the cotton which *E. Molyneux* seized; it is contended that, by this mode of treating the transaction between the merchant abroad and his agents here, the debt was paid. I am however

unable to accede to that argument. There must be one order on both petitions, dismissing that of the assignees of *Humberston* and *Frodsham*, and giving the assignees of *T. B. Molyneux* liberty to prove against the estate of *Humberston* and *Frodsham* for the full amount of the purchase money.

A motion having been made to vary the minutes of the order, it was arranged that the motion should be treated as a petition for a rehearing of the former petitions and the order thereon, and should be considered as intituled in the bankruptcy of *T. B. Molyneux* as well as in the other bankruptcy.

The case coming on this day to be heard accordingly,

1845.

Ex parte  
MOLYNEUX  
and others.

Feb. 5.

Mr. *Swanston*, Mr. *Cowling* and Mr. *Follett*, on behalf of the assignees of *Humberston* and *Frodsham*. The vessel in which the cotton was shipped must be considered to have been a general ship. The bill of lading of the cottons was in these terms, "Shipped in good order and condition by *T. B. Molyneux*, on board the good ship or vessel called the *Diamond*, whereof is master for this present voyage *Toole*, now lying in the port of Charleston, and bound for Liverpool, 304 bales upland cotton, being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the aforesaid port of Liverpool (the danger of the seas only excepted) unto order, or to assigns, he or they paying freight for the said cotton,  $\frac{2}{7}$  of a penny per lb. for square, and  $\frac{4}{8}$  do. round, with primage and average accustomed. In witness, &c. *John Toole*." The words "paying freight" are conclusive, for if Messrs. *Humberston* & Co. were owners of the ship and the goods too, there would be no freight to

1845  
  
 Ex parte  
 Molyneux  
 and others.

pay; *Tucker v. Humphrey* (a), *Boghtlingh v. Inglis* (b), *Smith v. Goss* (c), *Oppenheim v. Russell* (d). Whether the stoppage at once of itself rescinded the contract, is an unsettled question; *Wentworth v. Outhwaite* (e); but however that may be, it is clear that the contract was rescinded by the resale. Then the contract having been rescinded, there is no debt to be proved. They referred to *Hagedorn v. Laing* (f) and *Maclean v. Dunn* (g). As *T. B. Molyneux* sanctioned the credit given to him in his accounts for the proceeds of the sale, it is the same thing as if the money had been handed over to him, or as if he had stopped and kept the goods. The question is left untouched by any of the proceedings at law, which all turned on points of pleading only (h).

Mr. Bacon and Mr. Rolt for the assignees of *T. B. Molyneux*.

Mr. Swanston, in reply, referred to *Jackson v. Nichol* (i).

The CHIEF JUDGE.—The petitioner, Mr. Brancker, as the sole surviving assignee under the bankruptcy of *Humberston* and *Frodsham*, made a proof against the estate of *T. B. Molyneux* under the bankruptcy of *T. B. Molyneux*, and it is agreed that, if the proof is

(a) 4 Bing. 517.

(c) 1 Camp. 282.

(e) 10 M. & W. 436.

(b) 3 East, 381.

(d) 3 B. & P. 42.

(f) 6 Taunt. 162.

(g) 4 Bing. 722.

(h) *Brancker v. Molyneux*, 3 Scott, N. R. 332; 3 Man. & Gr. 84; 1 Man. & Gr. 710; 1 Scott, N. R. 553; 4 Scott, N. R. 753.

(i) 5 Bing. N. C. 516.



to be treated as a substantial proof, no wrong is done to the petitioner by the order now reheard.

The question therefore is, whether this petitioner should be assisted in his desire to remove the proof which he has himself made deliberately and (after litigation) against the estate of *T. B. Molyneux*; whether he shall be permitted to withdraw this proof, those against whom it is made not desiring to have it withdrawn. Before I accede to this request,—a request for judicial indulgence,—I ought to be satisfied that the ends of substantial justice will be assisted by it. If, on the other hand, substantial justice is assisted by adhering to form, form can never be of better service.

The first question is, whether there was such a delivery of the cotton as to preclude stoppage *in transitu*, because, if there was, the assignees of *T. B. Molyneux* have a complete title to be paid the price, which has never yet been paid. That right, I apprehend, could not be taken away by the wrongful repossession, in this country, of the goods so delivered. That wrongful act would be the subject of another remedy. Upon this question, the inclination of my opinion is, that under the circumstances of the case there was a complete delivery, but it is not necessary to decide, and I do not decide that point.

Secondly, supposing that there was not a complete delivery of the goods, then the right of stopping *in transitu* was properly exercised, and the goods were properly prevented from finding their way to the hands of Messrs. *Humberston* and *Frodsham*, or their assignees. Through the assistance of the mortgagee of the ship, one of the partners in a firm, who were the vendor's agents, the ven-

1845.



Ex parte  
MOLYNEUX  
and others.

1845.

Ex parte  
MOLYNEUX  
and others.

dor's agents possessed themselves of the goods and sold them, and gave credit for the proceeds to their principal.


But what does the petitioner do? Why, without any colour of moral title, he brings an action against the mortgagee, in substance—for this Court will not be trammelled by the form—to recover the value of the cotton from one of the firm who were the agents of *T. B. Molyneux*, and recovers, in fact, the value of the goods never paid for.

Under these circumstances, I apprehend that if I were to assist the petitioner to deliver himself from the proof which he has himself made, I should either leave the matter where it stands, or assist in doing moral injustice. I cannot for such a purpose deliver a party from the position in which he has placed himself. The order must be as follows:

“The said several parties by their said counsel agreeing, and submitting that the said motion should be considered and treated as a petition of rehearing of the said former petitions and order, and should also be considered and treated as a petition presented and intituled ‘In the matter of *T. B. Molyneux*, a bankrupt,’ as well as ‘In the matter of *C. Humberston* and *S. Frodsham*, bankrupts,’ and the said *A. L. Molyneux*, *J. Chaffers* and *J. Follett* declining to consent that the proof for 2086*l.* 7*s.* 8*d.*, made by the said *T. Brancher* under the fiat in the bankruptcy against the said *T. B. Molyneux*, should be expunged, withdrawn or reduced, and insisting on such proof standing, this Court doth order that

the said former order of this Court, dated the 8th day of August, 1844, be varied, and as varied do stand as follows, and doth accordingly, upon the said motion and petitions, declare that the said proof, made by the said *T. Brancher* under the fiat issued against the said bankrupt *T. B. Molyneux*, ought not to be expunged, withdrawn or reduced, and that under the circumstances of the case, the right of the said *A. L. Molyneux*, *J. Chaffey* and *J. Follett*, as assignees of the estate of the said bankrupt *T. B. Molyneux*, to prove against the estate of the said bankrupts *C. Humberston* and *S. Frodsham*, was not nor is defeated, prejudiced or diminished, by means of the said *T. B. Molyneux* having had credit given him by *Molyneux, Taylor & Co.*, in the account between *Molyneux, Taylor & Co.*, and the said *T. B. Molyneux*, for the proceeds of the cotton in question or any part thereof, or having in that manner had the benefit thereof, or by means of the action brought against *E. Molyneux* by the said assignees of the estate of *C. Humberston* and *S. Frodsham*, or any proceedings in that action; and with that declaration it is ordered, that the said *A. L. Molyneux*, *J. Chaffers* and *J. Follett*, as such assignees as aforesaid, be at liberty to go in under the said fiat issued against the said *C. Humberston* and *S. Frodsham*, and make such amount of proof in respect of the said alleged debt or sum of 3036*l.* 16*s.* 7*d.*, or any part thereof, as they can establish, and be paid a dividend or dividends on such proof rateably with the other creditors of the

1845.

  
Ex parte  
MOLYNEUX  
and others.

1845.

Ex parte  
MOLYNEUX  
and others.

said bankrupt under such fiat, and that the Commissioner of her Majesty's Court of Bankruptcy, acting in prosecution of the said fiat, do receive and admit such proof accordingly; but this order is to be without prejudice to any question as to the amount proveable under this order, or to the question whether the said bankrupt *T. B. Molyneux* is to join in such proof; and this Court doth order that the said petition of the said *T. Brancker* and others be and the same is hereby dismissed; and it is ordered that the costs of both parties, of and occasioned by both the said petitions, and of and occasioned by the said order hereby varied, and of and occasioned by the said motion, be paid to them in manner hereinafter mentioned out of the estate of the said *C. Humberston* and *S. Frodsham* (a)."

(a) This decision has been affirmed by the Lord Chancellor on appeal.  
See *post*.

Ex parte JOSEPH WOOD and THOMAS WOOD.

—In the matter of THOMAS TODD, and in the matter of FRANCIS DEFLINNE.

*Lincoln's Inn,  
February 12th.*

Two partners trade under the name of one of them only, and upon a dissolution, that one continues the business, the other retiring;

but no apparent change takes place in the firm. By the agreement on the dissolution, the stock in trade belongs to the continuing partner, who afterwards becomes bankrupt. The stock in trade is sold by his assignees as his separate property, and the retired partner, though cognizant of the fact, makes *no objection or claim* on the retired partner becoming bankrupt. *Held*, that the stock in trade was not in the reputed ownership of the two, but ought to be administered as the separate estate of the continuing partner.

SEE in the matter of *Todd*, *ante*, p. 87. After the decision of the Court of Review in that case, that *Joseph Wood* was entitled to prove against the separate estate of *Thomas Todd*, and before the hearing of the special case,

*Joseph Wood* proved his debt of 3000*l.*, and 85*l.* 1*s.* 4*d.* for interest, under the fiat against *T. Todd*, as the separate debt of *T. Todd*, and the question now was whether the stock in trade ought to be administered as the separate estate of *T. Todd*.

1845.  
  
 Ex parte  
 Wood  
 and another.

It appeared that from the time of the dissolution of the partnership in January, 1837, up to and at the time of *Todd's* bankruptcy, *Todd* remained in the actual possession and ownership of all the property, which had belonged to the partnership while it subsisted, and of such property as he subsequently acquired. One of the creditors of *T. Todd* brought an action against *Deflinne*, upon the allegation that *Deflinne* continued liable as the partner of *Todd* up to the time of the bankruptcy, notwithstanding the dissolution, by reason that sufficient notice of such dissolution had not been given. The action was tried at the Liverpool Spring Assizes in 1843, when a verdict was returned for the plaintiff, and a new trial having been ordered, the action was again tried at the Liverpool Summer Assizes in 1844, when a verdict was again returned for the plaintiff. All the assets which had been received by the assignees were carried into one account, and were treated as the separate estate of *Todd*, and as distributable among his separate creditors, and before the appointment of the official assignee, the creditors' assignees styled themselves in the banking account with the Manchester and Liverpool District Banking Company, as assignees of *Todd*. They advertised for sale the stock and effects which at the time of his bankruptcy were in his possession, and sold as his assignees, and in that character alone received the proceeds.

Upon the appointment of the official assignee, the

1845.

Ex parte  
Wood  
and another.

balance in the hands of the creditors' assignee amounted to the sum of 8186*l.* 3*s.* 8*d.*, which had been in a great measure realized by the sales, and although several persons, alleging themselves to be creditors of *Todd* and *Deflinne*, had been admitted to prove debts under the fiat against *Todd*, yet they had only been so admitted for the purpose of enabling them to vote in the choice of assignees, and not for the purpose of receiving dividends.

A meeting for the purpose of declaring a dividend of *Todd's* estate was held on the 15th of July, 1844, when the Commissioner acting in the prosecution of the fiat, having been informed that a new trial had been granted in the above-mentioned action, observed that it might become necessary for the creditors who had proved in respect of debts due to them from *Todd* and *Deflinne* jointly to apply to amend their proofs, in order to be entitled to receive dividends rateably with those creditors who had proved against the estate of *Todd* alone.

Ultimately the Commissioner decided, that as the matter then stood, he could only consider the assets which had been realized under the fiat as the separate assets of *Todd*, and order the distribution thereof amongst the creditors who had proved against his estate separately. He however ordered the meeting to be adjourned until the 14th of November, 1844, in order to give the creditors, who had proved debts due to them from *Todd* and *Deflinne* jointly, an opportunity of applying to amend their respective proofs, if they thought proper so to do, and also to give time to ascertain the result of the appeal to the Lord Chancellor which was then pending, as well as to ascertain what the verdict would be in the second trial of the action.

On the 26th of September, 1844, a fiat issued against *Definne*, and on the 13th of November, 1844, the assignees obtained *ex parte* the usual order for the Commissioner to cause distinct accounts to be kept of the joint estate or partnership firm of *Todd* and *Definne*, if there should be any such joint estate, as well as of the separate estate of *Todd*, with the usual consequential directions.

The Commissioner decided that the estate of *Todd*, which had been possessed by the assignees (except the amount realized from the furniture of *Todd*), formed the joint estate of *Todd* and *Definne*, and expressed his determination to order a dividend thereof to be declared amongst the trade creditors of *Todd* at the time of his bankruptcy, who had proved debts under the fiat, without distinguishing whether such creditors did or did not know that *Definne* had been or continued to be a partner with *Todd*. The Commissioner also decided, that inasmuch as the petitioners had proved their debts as separate creditors of *Todd*, and had brought actions against *Definne* in respect of their several bonds, they had elected to go upon the respective separate estates, and were not entitled to receive any dividend out of the fund which the Commissioner had so decided to form joint estate.

The prayer of the present petition was, that it might be declared that the manner in which the Commissioner had expressed his intention of dividing and distributing the estate mentioned in the petition, was erroneous, and that the declaration of any dividend upon the principle of the determination of the Commissioner might be stayed, and that it might be declared that all the

1845.

Ex parte  
Wood  
and another.

1845.  
  
*Ex parte*  
*Wood*  
 and another.

estate and effects of which *Todd* was in possession at the time of his bankruptcy, and which had been or should be realized under the fiat against him, formed the separate estate of *Todd*.

*Mr. Russell* and *Mr. Bacon* in support of the petition. The dissolution of partnership took place on the 2nd of January, 1837, and *Todd* retained the whole of the stock and effects of the partnership from the time of the dissolution, *Deflinne* having no interest or any right to interfere. Even if it could be shown that *Todd* was not the actual owner of the property which had been realized by the assignees, yet that property was nevertheless in the order and disposition of *Todd* alone at the time of his bankruptcy. The fact of *Deflinne* being liable at law to some of the creditors of *Todd*, by reason of no sufficient public notice having been given of the dissolution of partnership, could make no difference.

*Mr. Rolt* and *Mr. Woolrych* for the assignees. The goods originally belonged to *Todd* and *Deflinne*; it is incumbent upon those who claim them as the separate property of *Todd* to show that the change of ownership took place with sufficient notoriety to prevent the reputation of ownership continuing. It makes no difference as to reputed ownership, that one of the reputed owners was the real owner, for it is not necessary that the reputed ownership should be altogether apparent ownership; *Ex parte Enderby* (a). *Ex parte Hunter* (b) decided long ago that although the property of a partnership belong to one or more members of it, yet in bankruptcy it is administered to the joint creditors

(a) 2 B. & C. 389.

(b) 2 Ro. 382.



as belonging to them all. They also cited *Ex parte Jackson* (a).

1845.

*Ex parte*  
Wood  
and another.

Mr. *Russell* in reply.

The CHIEF JUDGE.—*Todd* and *Deflinne* were partners, and the stock in trade belonged to the partnership. The partnership was dissolved by an agreement, fair and complete as between the partners themselves. A part of the agreement was, that the stock in trade should belong to *Todd*, and as between *Todd* and *Deflinne* it was delivered according to the intention of the parties.

The dissolution, however, it is said, was not sufficiently published, and it has been argued that for want of publication of the dissolution, and on account of the absence of any change of the style of the firm, *Deflinne* remained liable to the debts contracted by *Todd* alone, after the dissolution, with persons who had been aware of the partnership and not of the dissolution. It is also assumed in the argument, that as to the world the two appeared as owners of the stock in trade, that is to say, that by the consent and permission of *Todd*, the true owner, *Deflinne* and *Todd* had in their possession, order and disposition, goods whereof they were the reputed owners, the true title being in *Todd* alone.

*Todd* becomes bankrupt, *Todd* alone. The assignees under his bankruptcy claim the goods and seize them as his. They sell them as his, and receive the proceeds. *Deflinne* is aware of this, and makes no claim to the goods. He admits by his conduct the title of the assignees to sell. His conduct amounts to a declaration

(a) 1 Ves. jun. 131.

1845.

Ex parte  
Wood  
and another.

that he had no interest in them—to a virtual disclaimer of interest. In point of fact, this disclaimer was in accordance with the true state of the title as between the two.

After all this, *Deflinne* commits an act of bankruptcy, and becomes bankrupt, and no question could arise as to the title to the goods, or as to the application of the proceeds, but for the statutory law as to order and disposition.

The single question is, whether under the circumstances of the case the 72nd section of the act varies the true title as to the administration of the property. The words of the section are, “If any bankrupt, at the time of his bankruptcy, shall, by the consent and permission of the true owner thereof, have in his possession, order or disposition, any goods whereof he was the reputed owner, &c.” To try the question of the application of the statute, we must ask this question, whether *Todd* and *Deflinne* had in their possession at their bankruptcy, by the consent and permission of *Todd*, any goods of *Todd*, whereof *Todd* and *Deflinne* were reputed owners. I am of opinion that this state of things did not exist, that the statute has no application, and that the goods must be administered as the separate estate of *Todd*.

Ex parte CHARLES BROOKS TEAGUE.—In the matter of FREDERICK ARNOLD BERRENGER.

February 12th.

Where an official assignee had been appointed, but

although three meetings had been advertised for the choice of assignees, no creditor attended, and the bankrupt passed his last examination: *Held*, that the bill of the solicitor to the petitioning creditor was payable out of the assets realized, although there would not then remain any fund to pay the 10*l.* and 20*l.* made payable by the 1 & 2 *Will.* 4, c. 56, ss. 46 and 55, the bankrupt having obtained his certificate, and an affidavit being made of there being no probability that any creditor would come in and prove.

THE petition stated that the petitioner was the solicitor to the fiat, and it prayed payment of his bill of costs.

The fiat issued October 10th, 1844. On October 11th an official assignee was appointed. On October 15th a meeting was advertised for the 26th for proof of debts and choice of assignees, and another meeting for proof of debts, and the bankrupt's last examination for November 27th.

No creditor attended at the first meeting, and the choice was adjourned till the 27th of November, and then no creditor attending, the choice and the last examination were adjourned till December 24th, on which day, no creditor attending, the bankrupt passed his last examination.

The assets amounted only to 6*l.* 6*s.* 3*d.*, which had been received by the official assignee, and out of this sum the petitioner's bill up to November 27th had been paid, leaving 33*l.* in the hands of the official assignee. The subsequent costs had been taxed at 11*l.* 1*s.* 10*d.*, and on the petitioner's applying for payment of them, the Commissioner refused to direct them to be paid, on the ground that the two sums of 20*l.* and 10*l.* payable under the 1 & 2 *Will.* 4, ss. 46 and 55(a), must be first paid.

(a) 1 & 2 *Will.* 4, c. 56, s. 46, " That there shall be paid to the said Accountant General, to be placed by him to the like account, by the official assignee of each bankrupt's estate to be administered in the said Court of Bankruptcy, out of the first monies that shall come into his hands, and immediately after the choice of assignees by the Commissioners, the sum of 20*l.*,

Sect. 55. " That for the purpose of raising a fund to meet the compensations hereinbefore directed to be made to the said patentees and commissioners of bankrupt, there shall be paid by the official assignee of each bankrupt's estate to be administered in the said Court of Bankruptcy, immediately after the choice of the assignees by the creditors, or so soon afterwards as a sufficient sum shall come into his hands for the purpose, over and beyond the sum hereinbefore directed to be paid by such official assignee, the sum of 10*l.* into the Bank of England, to the credit of the said Accountant-General, to be carried to a separate account to be intituled,

1845

Ex parte  
TRAQUER.

1845.

Ex parte  
TREASUR

Mr. *Glasse* in support of the petition. The petitioner's bill must first be paid, that being by the act 6 Geo. 4, c. 16, s. 14 (a), payable out of the "first monies" got in, and although the same words are used in the 1 & 2 Will. 4, c. 56, s. 4, yet they must be taken as subject to the former provision, which is not altered or repealed by the 1 & 2 Will. 4, c. 56. Besides, the monies directed to be paid by the latter enactment are not payable till after the choice of assignees, and it is obvious that there will never be any choice here (b).

Mr. *Anderdon* for the official assignee.

The CHIEF JUDGE.—6 Geo. 4, c. 16, s. 14, seems difficult to be reconciled with 1 & 2 Will. 4, c. 56, s. 45, and if they are inconsistent, I suppose that courts of justice must decide on the principle that *leges posteriores priores contrarias abrogant*. As to the solicitor's bill not

'The Secretary of Bankrupts' Compensation Account,' and in like manner there shall be paid to the said Accountant General, to be placed by him to the like account, by such official assignee, for every sitting of the said Court of Bankruptcy, or of any division judge or commissioner thereof, other than the sitting at which any person may be adjudged a bankrupt, or any sitting for the choice of assignees, or any sitting for receiving proofs of debt prior to such choice, or any sitting at which any bankrupt shall pass his or her last examination, or any sitting at which any dividend shall be declared, or any sitting at which the bankrupt's certificate shall be signed by the commissioners, the sum of 1*l*."

(a) 6 Geo. 4, c. 16, s. 14, "That the petitioning creditor or creditors shall at his or their own costs sue forth and prosecute the commission until the choice of assignees, and the commissioners shall at the meeting for such choice ascertain such costs, and by writing under their hands direct the assignees (who are hereby thereto required) to reimburse such petitioning creditor or creditors such costs out of the first money that shall be got in under the commission."

(b) The same argument applies to the solicitor's bill, which by 6 Geo. 4, c. 16, s. 14, is not payable till the choice of assignees.

being payable under 6 *Geo.* 4, c. 16, s. 14, until the choice, I could, under the general jurisdiction, order a solicitor to be paid out of a fund in court; and if I could be judicially satisfied that no creditor would prove, and the bankrupt obtained his certificate, I might make the order sought, but as he has not obtained his certificate, any after-acquired property (such as a legacy) would go to the creditors, and then perhaps they would come in and prove. If the bankrupt obtains his certificate, and it can be shown that there is no probability that any proof will ever be made, the inclination of my opinion may be in favour of the costs against the fees.

1845.

Ex parte  
TRAGUS.

The petition was ordered to stand over.

On the petition being mentioned again on this day, February 18th.

Mr. *Glasse*, for the petitioner, produced an affidavit of there being no probability of a choice of creditors' assignees ever taking place.

Mr. *Anderdon*, for the official assignee, offered to pay.

The CHIEF JUDGE.—I think that I may assume that there will be no choice of assignees, and as the public right does not accrue until the choice, you may take the order.

Ex parte JAMES DIAMOND.—In the matter of  
JAMES DIAMOND.

February 12th.

THIS was the petition of the bankrupt to have the fiat annulled with the consent of all the creditors who had proved, to annul the fiat, the Commissioner refused to sign the requisite certificate, unless the fees of 20*l.* and 10*l.* payable under 1 & 2 *Will.* 4, c. 56, ss. 46 and 56, were paid. There were no assets. The fiat was ordered to be annulled on the registrar being satisfied of the concurrence of the creditors.

On a petition of the bankrupt, with the consent of all the cre-

1845.  
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*Ex parte*  
*DIAMOND.*

proved. On application to the Commissioner to certify in the usual way that the petitioner had surrendered, and submitted to be examined, and that the consenting parties were the only creditors who had proved under the fiat, the Commissioner (Mr. *Fane*) refused to sign the certificate, unless the fees of 20*l.* and 10*l.*, made payable by the 1 & 2 *Will.* 4, c. 56, ss. 46 and 55, were paid.

No assets had been received.

The petitioner prayed that the Commissioner might be ordered to certify, or that the fiat might be annulled without his certificate.

Mr. *Rolt* in support of the petition cited *Ex parte Green(a)*.

The COURT ordered the fiat to be annulled, on the registrar being satisfied that all the creditors who had proved concurred in the application.

(a) 1 M. D. & D. 174.

*Ex parte* JAMES MILLER.—In the matter of  
 JAMES MILLER.

*Lincoln's Inn,*  
*March 17th.*

A meeting and an adjourned meeting are held for the choice of assignees,

but none are chosen. *Held*, that the payment of 1*l.* directed by 1 & 2 *Will.* 4, c. 56, s. 55, to be made for every sitting other than any sitting for the choice of assignees, &c., was not due on either of the above sittings.

On the bankrupt petitioning to annul the fiat with the consent of the creditors, and the Commissioners refusing to sign the usual certificate until the above fees, and the fees of 20*l.* and 10*l.* payable under the same act (ss. 46 and 55) were paid: *Held*, that the fiat ought to be annulled on payment out of the fund realized of the expenses and a proper remuneration of the official assignee, to be ascertained by the Commissioner.

The adjudication took place January 31st. A meeting for the choice of assignees was held on February 18th, and adjourned to the 26th, but no choice had been made. The bankrupt's business had been carried on for a time by the official assignee, and the assets in hand amounted to 28*l*. The Commissioner (Mr. *Holroyd*) refused to sign the usual certificate, that the bankrupt had surrendered and submitted to be examined, and that the consenting parties were all the creditors who had proved, until the fees of 20*l*. and 10*l*., made payable by 1 & 2 *Will.* 4, c. 56, ss. 46 and 55, were paid, and also the expenses and remuneration to the official assignee, and the sum of 1*l*., made payable by sect. 55, for each sitting other than a sitting for the choice of assignees, &c (a).

1845.  
  
*Ex parte*  
 MILLER.

Mr. *Bird*, in support of the petition, cited *Ex parte Diamond* (b) and *Ex parte Green* (c).

Mr. *Rolt* for the official assignee. This case differs from *Ex parte Diamond*, for there there were no assets, while here there are enough to pay the expenses. The creditors used the Court of Bankruptcy as a means of bringing about a compromise, and now they do not wish to pay the fees to the officers of the Court. In *Ex parte Green* no assets had been got in. The expenses and remuneration of the official assignee must be paid, and the fees of 1*l*. on the sittings; for they were not sittings for the choice of assignees, none having been chosen; at all events the act did not mean to exempt from the 1*l*. payment more than one sitting for the choice of assignees.

The CHIEF JUDGE.—I am of opinion that the pay-

(a) See note to last case.    (b) See last case.    (c) 1 M. D. & D. 174.  
 VOL. I. L

1845.

Ex parte  
MILLER.

ments of 20*l.* and 10*l.* do not become due till the choice of assignees by the creditors in the usual way. I think also that an adjourned meeting for the choice of assignees is a meeting for the choice, and that there has therefore been no meeting on which the 1*l.* is payable. But I think that the expenses must be paid out of the fund in hand, and that there should be a reference to the Commissioner to ascertain them, including the costs of this petition.

The Order was, that it be referred to the Commissioner to take an account of all proper expenses incurred by the official assignee under the fiat, and he was to allow the official assignee such remuneration for his services as under the circumstances should appear proper, the costs of the petition included. Fiat annulled.



Ex parte CHARLES ALLEN YOUNG and ANTHONY FOTHERGILL BAINBRIDGE.—In the matter of WILLIAM ALFRED WORTH.

*Lincoln's Inn,  
March 17 & 20,  
and  
April 9.*

Form of order  
upon a petition  
of an equitable  
mortgagee, who  
was sole creditors'  
assignee.

ONE of the petitioners was the sole creditors' assignee, and this was the petition of himself and his partner, who were brewers, and equitable mortgagees of a public house belonging to the bankrupt, praying for a sale, with liberty for the petitioners to bid, the Commissioner appointing a solicitor to conduct the sale on behalf of the estate.

A written consent to the petitioners being allowed to bid had been signed by all the creditors who had proved, in the following terms:—"We, the undersigned creditors of *W. A. Worth*, late of the Cock and Crown public house, Hampstead, in the county of Middlesex,



victualler, a bankrupt, and who have severally proved debts against his estate, do hereby consent and agree that *C. A. Young* and *A. F. Bainbridge*, of Wandsworth, in the county of Surrey, brewers, equitable mortgagees of the said messuage and premises called the Cock and Crown aforesaid, and which said *C. A. Young* is also assignee of the estate and effects of the said bankrupt, shall have liberty to bid at any sale of the said premises for the purchase of the same or any part thereof. And we do further consent and agree to any order which the Court of Review may think proper to make as to such sale and liberty to bid, or to any other order which the said Court of Review may make with reference to a sale of the said messuage and premises called the Cock and Crown aforesaid.

1845.

Ex parte  
YOUNG  
and another.

Mr. *Bichner* in support of the petition. In a case of *Ex parte Hollyman (a)*, heard before your Honor, an

(a) The following were the orders in this case :

“ Tuesday, 13th of February, 1844.

“ In the matter of *Thomas Stokes*, a Bankrupt.

“ Whereas *Wm. Hollyman*, of Clevedon, in the county of Somerset, Gent, did on, &c., praying that the said petitioner might be at liberty, by himself or his agent or agents, to bid for and purchase the said messuage or hotel, lawn, garden, stables, coach-houses, brewery, &c. mentioned in the said petition, at the sale on the 15th of February next. Now on hearing, &c., and what was alleged by Mr. *Heathfield*, of counsel for the petitioner, offering to pay the sum of 3700*l.* for the messuage or hotel, lawn, garden, stables, coach-houses, brewery, erections, buildings, strip or piece of ground and hereditaments in the said petition mentioned, &c., this Court doth order the said messuage or hotel, lawn, garden, stables, &c. in the said petition mentioned as having been advertised for sale on the 15th day of February instant, be not sold unless for a sum exceeding 3700*l.*”

“ Friday, 1st day of March, 1844.

“ In the matter of *Thomas Stokes*, a Bankrupt.

“ Whereas *Wm. Hollyman* preferred his petition to this Court, and wherein this Court made an order on the 13th day of February last, and

1845.  
  
*Ex parte*  
 Young  
 and another.

order was made giving the assignee permission to purchase part of the bankrupt's estate. In *In re Salisbury (a)* a mortgagee, who was sole assignee, was permitted to bid upon terms.

Mr. *Smythe* appeared for the bankrupt.

The CHIEF JUDGE, after reading the order in *Ex parte Hollyman*, remarked that the petitioner was not the sole assignee there, and said he had the greatest objection to the same person being vendor and purchaser, and that there must at all events be an affidavit of the value of the property, before he could make any order upon the petition.

March 20. On this day Mr. *Bickner* produced an affidavit that the property was worth only 250*l.*, and said the petitioners were willing to give 700*l.*, and cited *Anon. (b)*, &c.,

whereas a motion was on this day made unto this Court by Mr. *Heathfield*, of counsel for the said petitioner, praying that the said *Wm. Hollyman* might be declared the purchaser of the messuage, &c. at or for the price of 3700*l.* Now upon hearing the said petition and order, and the affidavit of *George Clement Harril*, filed in support of the motion, and what was alleged by the said counsel in support of his said motion, and by Mr. *Sturgeon*, of counsel for the respondents, the other assignees of the estate of the said bankrupt, and also for the respondents, the first mortgagees, *George Rogers* and *Francis Short*, appearing and not opposing, this Court doth declare that the said petitioner is to be at liberty to purchase the said messuage, &c. at or for the price or sum of 3700*l.*, provided the Commissioner of her Majesty's Court of Bankruptcy, acting in the prosecution of the fiat issued against the said bankrupt, shall be of opinion that it is for the benefit of the estate of the said bankrupt, that the said petitioner should so purchase the said hereditaments for such sum, and it is ordered that the said petitioner do pay to the several parties their costs of and occasioned by the said former application to this Court and of and occasioned by this application."

(a) *Buck*, 245.

(b) 2 *Russ.* 350; but see also *Ex parte Beaumont*, 1 *M. & A.* 350; 3 *D. & C.* 550; *Ex parte Badcock*, *Mont. & M'Ar.* 238; and note (b) to *Ex parte Alexander*, 2 *M. & A.* 494.

where Lord *Eldon* gave the assignee leave to bid, the other creditors consenting. He also cited *Ex parte Morland(a)*, where the present Lord Chancellor made a similar order.

1845.  
  
*Ex parte*  
*Young*  
 and another.

The CHIEF JUDGE.—Let the official assignee undertake and consent to conduct the sale, if he is willing, but I do not order him to do so. The property is not to be sold for less than 700*L*. If more is bid, it is to be sold to the best bidder. The assignee is not to bid, but he may apply to open the biddings.

On this day Mr. *Kirkman* appeared for the official assignee, who undertook to conduct the sale, whereupon

*April 9.*

The COURT ordered the usual accounts to be taken, and that the premises should be put up for sale before the Commissioner, and that the sale should be conducted by the official assignee; but if at any such sale there should not be any bidding which should amount to 700*L*., then it was ordered that the petitioner should become the purchaser of the premises at 700*L*., and out of the proceeds of the sale the expenses of the sale, and the costs of the petitioner and the official assignee, were to be first paid, and the surplus applied in payment of what should be found due to the petitioners, with the other usual directions, and the petitioners were to pay the bankrupt his costs of and occasioned by the application.

(a) Mont. & M'Ar. 76.

1845.



Ex parte WILLIAM NEWLANDS.—In the matter of the Order of the Court of Bankruptcy upon the Petition of WILLIAM NEWLANDS, a Prisoner in the Queen's Prison.

March 19.

On an application by an insolvent for a final order, under 7 & 8 Vict. c. 96, s. 6, the Commissioner remanded the insolvent (who had previously been discharged under the act), on the ground of his having recently petitioned the Insolvent Debtors' Court, and that proceedings were pending there:—*Held*, that there was no appeal to the Court of Review from this order.

THIS was a petition to discharge an order of Mr. Commissioner *Fane*, under the act 7 & 8 Vict. c. 96, s. 6 (a). The petitioner, when in custody under an execution, had filed his petition in the Court for the Relief of Insolvent Debtors, and after the usual vesting order was made, he, on the 22d April, 1844, applied for his discharge, and was remanded until he should file an

(a) And be it declared and enacted, that any prisoner in execution upon any judgment obtained in any action for the recovery of any debt, either not being a trader within the meaning of the statutes relating to bankrupts, or being trader within the meaning of the said statutes, owing debts amounting in the whole to less than 300*l.*, may be a petitioner for protection from process; and every such petitioner, to whom an interim order for protection shall have been given, shall not only be protected from process, as provided by the said recited act, but also from being detained in prison in execution upon judgment obtained in any action for recovery of any debt mentioned in his schedule; and if any such petitioner, being a prisoner in execution, shall be detained in prison in execution upon any such judgment, it shall be lawful for the Commissioner to order any officer, who shall have such petitioner in custody by virtue of such execution, to discharge such petitioner out of custody as to such execution without exacting any fee, and such officer shall hereby be indemnified for so doing, and no sheriff, gaoler, or other person whatsoever, shall be liable to any action as for the escape of any such prisoner by reason of such his discharge; and such petitioner so discharged shall be protected by his interim order from all process for such time as the Commissioner shall by such interim order, or any renewal thereof, think fit to appoint, until the making of the final order for protection, in the same manner as if such petitioner had not been a prisoner in execution: Provided always, that after the time allowed by any such interim order, or any renewal thereof (as the case may be), shall have elapsed, such petitioner shall not by such discharge be protected from being again taken in execution upon such judgment, but such judgment shall remain in full force and effect notwithstanding such discharge.

amendment to his schedule, and the petitioner then filed a petition and schedule in the Court of Bankruptcy, under the act 7 & 8 Vict. c. 96, and on the 7th September, 1844, he appeared before the Commissioner, who declared him entitled to the benefit of the act, and appointed the 4th of November, 1844, for making the final order.


1845.  
Ex parte  
NEWLANDS.

On the 3d January, 1845, the Commissioner made the following order :

“ In the matter of *W. Newlands*, late of, &c., an insolvent debtor, not being a trader within the meaning of the laws relating to bankrupts, but owing debts amounting in the whole to less than 300*l*.

“ Whereas the said *W. Newlands* having filed his petition and obtained an interim order for protection from process, under the statute passed in the fifth and sixth years of the reign of her present Majesty, intituled “ An Act for the Relief of Insolvent Debtors;” and under another statute, passed in the seventh and eighth years of her said Majesty’s reign, intituled “ An Act to amend the Law of Insolvency, Bankruptcy and Execution,” an order of this Court, bearing date the 23d day of August last, was made, whereby it was ordered that the keeper of the Queen’s Prison, or any officer who should have the said *W. Newlands* in custody by virtue of the execution for debt in the said order mentioned, should discharge the said *W. Newlands* out of custody as to such execution, pursuant to the said last mentioned statute. And whereas, pursuant to notice for that purpose duly given, the said *W. Newlands* this day appeared in Court for his first examination, and upon such examination it appeared to this Court that he had recently petitioned the Insolvent Debtors’ Court, and that all his estate and

1845.

  
Ex parte  
NEWLANDS

effects are now vested in the provisional assignee of that Court under the vesting order, and proceedings are there pending, I refuse the final order. It is therefore ordered, in pursuance of the said last mentioned statute, that the said *W. Newlands* be remanded to his former custody; for which purpose it is further ordered, that one of the messengers of this Court, or one of his assistants, do take the said *W. Newlands* and forthwith convey him to the Queen's Prison, there to be detained upon such execution as aforesaid."

*Mr. C. P. Cooper* in support of the petition.

The CHIEF JUDGE.—The petitioner is not a bankrupt, and this Court has not, so far as I am aware, any jurisdiction in the matter.

*Mr. Cooper.* I submit that all decisions of any other branch of the Court of Bankruptcy are subject to review in this Court. He referred to 5 & 6 *Vict.* c. 116, ss. 1, 3, 8, 9, 13. and 7 & 8 *Vict.* c. 96, ss. 1, 3, 4, 5.

*Mr. Tripp*, for the opposing creditor, was not called upon.

The CHIEF JUDGE.—It is not, I apprehend, a necessary consequence of any jurisdiction being conferred by statute upon the Commissioners, that there should be an appeal to this Court. Whether there may be a state of circumstances in which this Court would have jurisdiction to interfere with anything done by the Commissioner, under either of the acts referred to, I give no opinion; but I think that the matter which is

the subject of this order, is not such as the legislature has rendered it the duty of this Court to review, and I decline reviewing it. I therefore dismiss the application, but without costs.

1845.  
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Ex parte  
NEWLANDS.

In the matter of JOHN CLARKE, RICHARD MITCHELL, JOSEPH PHILLIPS and THOMAS SMITH.

SPECIAL CASE.

THIS was an appeal from Sir *George Rose's* decision in the Court of Review of *Ex parte Christie*, reported in 3 *Mont. Dea. & De G.* 736 (a). The bankrupts were bankers, and one of them signed one of the notes of the bank in the following form :

Leicester and Lincolnshire Bank.

£5:0s.0d.

I promise to pay the bearer on demand, five pounds, here or at Messrs. *Williams, Deacon, Labouchere, Thornton & Co.* bankers, London, value received.

For *John Clarke, Richard Mitchell, Joseph Phillips,*  
and *Thomas Smith.*

*Richard Mitchell.*

The question was, whether the holder of this note could prove against the separate estate of *Mitchell*.

Mr. *Russell* and Mr. *Daniell* for the appellants. The case of *Hall v. Smith* (b) is completely in point, for there is no authority or principle in support of the dis-

*Before the Lord Chancellor, April 11th and November 6th and 12th.*

*R. M.* who carries on business in partnership with *J. C., J. P.* and *T. S.* as bankers, signs one of the notes of the bank in this form, "I promise to pay, &c. For *J. C., R. M., J. P.* and *T. S. R. M.*" On the firm becoming bankrupt, *Held*, that the holders could not prove on this note against the separate estate of *R. M.*

(a) There is an error in the first part of the marginal note of that report, which should be the same as the marginal note above.

(b) 1 B. & C. 407.

1845.  
 In the matter of  
 CLARK  
 and others.

inction taken in the Court below, that where there is a bankruptcy, a case like this is to be treated as one of principal and surety, although if there were no bankruptcy that relation could not be considered to exist. The decision in *Hall v. Smith* was founded on the cases of *Sayer v. Chayton* (a), *Galway v. Matthew* (b), *Clark v. Blackstock* (c), and *Marsh v. Ward* (d), and is relied on as an authority in *Lee v. Nixon* (e), and *Shipton v. Thorton* (f). It would be productive of the greatest inconvenience to decide in bankruptcy against an express decision of a court of law on such a point.

Mr. *M. D. Hill* and Mr. *Chapman* for the respondents, repeated the arguments adduced in the Court below. (See 3 *Mont. Dea.* and *De G.* p. 736.)

The LORD CHANCELLOR.—It appears to me that the proper construction of this note is, that it is a joint note only, but there is great difficulty in overruling the express decision in *Hall v. Smith*, decided by the Court of Queen's Bench so many years ago. If *Hall v. Smith* is law, I think it decides this case, which does not appear to me a case of principal and surety.

A case was stated for the opinion of the Barons of the Exchequer, and the two following questions submitted to them.

First. Whether, if an action at law had previously to the said fiat been brought against the said *Richard Mitchell* separately upon the three above mentioned notes, by the said *Robert Buckley* as the holder of the

(a) 1 Lutw. 696.

(b) 1 Campb. 403.

(c) Holt, N. P. R. 474.

(d) Peake, 17.

(e) 1 Ad. & El. 201.

(f) 9 Ad. & El. 314.



said notes, the said *R. Mitchell* would upon the form of the said notes have had a valid defence.

1845.

In the matter of  
CLARKE  
and others.

Second. Whether, if an action at law had previously to the said fiat been brought against the said *R. Mitchell* separately, upon the seven above mentioned notes by the said *R. Buckley* as the holder of the said notes, the said *R. Mitchell* would upon the form of the said notes have had a valid defence.

The case was heard on the 2nd of July, 1845.

Court of Exchequer (a), July 2, 1845, before Barons Parke, Alderson and Platt.

Mr. Daniell. *Hall v. Smith*(b) is an authority directly in point, and the only question is, whether it can be supported. This case has been the law of the country since 1823. No English text-book has ever disputed it, and it has been always acted on. It is said to have been questioned in *Story* on Partnership, p. 222, and in *Doty v. Bates* (c). On looking at these authorities, they will not be found to have that effect. The authorities on which the case of *Hall v. Smith* is founded, are *March v. Ward*(d), *Clark v. Blackstock* (e), *Galway v. Matthew* (f), which bear out the decision made in *Hall v. Smith*.

PARKE B.—It is an open question whether if *Mitchell* had not the authority of the others, he is not separately liable. There are several cases where, in actions for misrepresentation or otherwise, a person professing to be an agent, but not having authority, is held to be per-

(a) *Ex relations Mr. Chapman.*


(d) *Peake, N. P.*

(b) 1 B. & C. 407.

(e) *Holt, N. P. R. 474.*

(c) 11 Johnson's Rep. 543, American case (State of New York).

(f) 1 Campb. 403.

1845.  
  
 In the matter of  
 CLARKE  
 and others.

sonally liable. If *Mitchell* had authority, all are jointly liable. Here is one, and but one promise. You cannot make two promises out of one. Either *Mitchell* undertook to pay the debt of the four, or undertook to pay as their agent only. If he undertook as an agent, he did not separately undertake.

Mr. *Daniell*. In this case Mr. *Mitchell* is not merely an agent, he is one of the principals.

PARKE B.—A partner is an agent of all his co-partners in all partnership matters.

ALDERSON B.—Suppose a note signed for “*Childs & Co. A. B.*,” does it depend on *A. B.* being a partner, whether he is liable separately or no?

Mr. *Daniell*.—You must look at the form of the note, and the question must be decided on the general law of contracts. The word “I” constitutes a several liability. He, the signer, is separately liable at any rate, whether the others are liable or not. This form is adopted that the holder of the note may proceed against the signer without being entangled with the question of partnership.

PARKE B.—It cannot be both. It is impossible to say it binds himself singly, and also the firm—there is but one promise, and you cannot make two liabilities.

Mr. *Daniell*. There is another case decided subsequently to *Hall v. Smith*, where the principle of that case is recognized; *Shipton v. Thornton* (a).

(a) 9 A. & E. 314.

Mr. *M. D. Hill*, Mr. *Chapman* and Mr. *Macaulay*,  
were not called upon.

1845.

In the matter of  
*CLARKE*  
and others.

PARKE B.—This is *primâ facie* one promise of the four, and if *Mitchell* had authority from the four, the firm is bound. *Hall v. Smith* cannot be supported. The question on this note is, does it bind the agent personally, or does it bind the firm. No doubt it binds the firm. I think the opinion to be certified to the Lord Chancellor is, that there was no separate right of action.

ALDERSON B. concurred.

PLATT B. said he had no doubt that *Hall v. Smith* could not be supported.

Their Lordships returned the following certificate :

1. We are of opinion that if an action at law had previously to the fiat been brought against *Richard Mitchell* separately as upon the three first-mentioned notes, by the said *Robert Buckley* as the holder of the said notes, the said *Richard Mitchell* would upon the form of the said notes have had a valid defence.

2. We are also of opinion, that if an action at law had previously to the said fiat been brought against *Richard Mitchell* separately upon the seven above-mentioned notes, by the said *Robert Buckley* as the holder of the said notes, the said *Richard Mitchell* would upon the form of the said notes have had a valid defence.

In either case we are of opinion, that he might have

1845. **pleaded the non-joinder of his partners in abatement of the action.**  
 In the matter of **CLARKE**  
 and others.

**J. PARKE.**

**E. H. ALDERSON.**

**T. J. PLATT.**

November 5th and 12th. **The case came on again before the Lord Chancellor on this certificate, and his Lordship dismissed the appeal without costs.**

**Ex parte WILLIAM SIMPSON PATTERSON.—**

**In the matter of HENRY DAVID WILLIAMS.**

*Lincoln's Inn,  
April 23rd.*

Where, under a fiat sued out by the bankrupt himself, three meetings had been advertized for the choice of assignees, but none had been chosen, and at the last of the meetings the choice was adjourned *sine die*: Held, that the bill of costs of the bankrupt's solicitor, amounting to 36*l.* 1*s.* 6*d.*, was payable out of the assets in hand, amounting to 37*l.* 11*s.* 7*d.*, after payment of the messenger's costs (the official assignee waiving remuneration), without any reservation being made in respect of the office fees of 20*l.* and 10*l.*

**THE fiat in this case was sued out by the bankrupt himself, under 7 & 8 Vict. c. 96, s. 41, and this was the petition of his solicitor for payment of his bill of costs.**

**The fiat issued October 10th, 1844.**

**On the 11th the official assignee was appointed.**

**On the 15th a meeting was advertized for the 26th for the choice of assignees, and another meeting for the 27th of November for the bankrupt's last examination.**

**No creditor attended at the former of these meetings, and the choice of assignees was adjourned to the 27th of November, on which day two creditors proved, but neither of them became or offered to become assignee or assignees.**

**The choice was then adjourned again to December 24th, and the bankrupt passed his last examination.**

**No creditor attending on the 24th of December, the choice of assignees was adjourned *sine die*.**

**The solicitor's bill was taxed and allowed at 36*l.* 1*s.* 6*d.*, and the assets in the hands of the official assignee amounted to 37*l.* 11*s.* 7*d.* The official assignee**

declined paying the solicitor's bill, on the ground that the payments of 10*l.* and 20*l.*, under 1 & 2 *Will.* 4, c. 56, ss. 46 and 55, and the expenses and remuneration of the official assignee and messenger were first to be provided for.

1845.  
~~~~~  
Ex parte  
PATTERSON.

Mr. *Glasse* in support of the petition. This is the same case as *Ex parte Teague* (a). The fees of 20*l.* and 10*l.* are not payable till the choice of assignees, and the Court will not allow assets to be retained to answer contingent fees, which in all probability will never accrue due. The act 7 & 8 *Vict.* c. 96, s. 41, provides, that all the proceedings under a fiat sued out by the bankrupt himself, shall be prosecuted and carried on in the same manner as if the fiat had been issued and adjudicated upon on the petition of a creditor of the bankrupt, in which case it is clear that the bill of the party suing out the fiat is first payable under the 6 *Geo.* 4, c. 16, s. 14.

Mr. *Russell* for Mr. *Bell*, the official assignee. The right of the solicitor is only the right of the petitioning creditor. Here there is no petitioning creditor except the bankrupts, and the bankrupt himself cannot have a title as against the officers of the court. The question is one of importance, because there are many cases arising now of the same kind, where the assets are only sufficient to pay the expenses. As to the messenger's claim, whoever places himself in the situation of petitioning creditor, must be under all the liabilities which a petitioning creditor incurs. Now the solicitor to the petitioning creditor was always liable to pay the mes-

(a) *Ante*, p. 140.


1845.

  
Ex parte  
PATTERSON.

senger, who has no option, but is obliged to act. Is he here to have no remuneration? None of the recent enactments have altered the law as to the liability of the solicitor to pay the messenger's bill. The official assignee is willing to waive his own remuneration, but he has incurred a small charge of 14s. 9d. out of pocket, which ought to be repaid.

The CHIEF JUDGE.—Considering that the regular period at which the assignees should have been chosen is past, and also that there is a considerable probability that there will be no choice, in such a state of things I think the fees of 20l. and 10l. not payable. But the messenger should, I think, be paid in full, before the solicitor.

The Order declared that the fees of 20l. and 10l. were not payable out of the estate of the bankrupt. And Mr. *Bell* appearing before the Court, and waiving his claim to any remuneration in the matter, it was ordered that there should be paid out of the estate of the bankrupt the monies thereafter mentioned, in the order following: First, the costs of the petitioner and respondent, of and occasioned by the application, when taxed, then the disbursement of 14s. 9d. to the official assignee, then the costs of the messenger under the fiat. And lastly, the sum of 36l. 1s. 6d. to the petitioner on account of his costs in the petition mentioned, the petitioner by his counsel undertaking to abide by any order of the Court touching the taxation of the costs.



1845.



**Ex parte JOHN HIND.**—In the matter of **JOHN BARKER.**

*Lincoln's Inn,  
April 23.*

**THIS** was the petition of the petitioning creditor, praying that the fiat might be opened, and his debt declared a good petitioning creditor's debt. The debt which the petitioner offered to establish before the Commissioner at the sitting for opening the fiat was one of 200*l.*, due from the bankrupt to the petitioner, to secure which the bankrupt had delivered to the petitioner a promissory note, payable to the bankrupt, in the following form:—

£200

Middleton, January 9, 1841.

Six months' notice.

We jointly or severally promise to pay Mr. *John Barker* the sum of two hundred pounds on demand, and to allow at the rate of 5*l.* per cent. cash per annum for interest until the above sum is all paid.

*Philip Watson,*

*Thomas Allison,* his mark +

Witness, *Thomas Collison.*

At the sitting for opening the fiat, it appeared that, for securing the petitioning creditor's debt, the trader against whom the fiat was issued gave him a promissory note, which there were grounds for believing was forged. No prosecution having been instituted, the Commissioner declined proceeding with the fiat. On the petition of the petitioning creditor, the Court ordered the fiat to be transferred to another Commissioner and proceeded with.

Grounds were stated to the Commissioner for believing that this note was forged, whereupon the Commissioner declined opening the fiat. The petitioner deposed that when he received the note he did not know or suspect that the note was a forgery, and could not now prove that such was the case.

Mr. *Swanston* and Mr. *Lush*, in support of the petition, referred to *Ex parte Elliott(a)*.

The **CHIEF JUDGE** said that the debt might be good,

(a) 3 M. & A. 110.

1845.

Ex parte  
HIND.

although the note, by which it was collaterally secured, might have been forged, and ordered the fiat to be transferred to another Commissioner and proceeded with.

Ex parte RICHARD HARRIS.—In the matter of JOHN CLARKE, RICHARD MITCHELL, JOSEPH PHILLIPS and THOMAS SMITH.

April 30.

The rules of a friendly society provided that the treasurer retaining upwards of 10*l*. more than seven days after he was required to pay it over should be excluded from the society. They also provided that a particular firm should be the bankers of the society, with power for a general meeting to appoint other bankers: *Held*, that the bankers for the time being were not officers, so as upon their bankruptcy to entitle the society to payment in full.

THIS was the petition of a friendly society at Leicester, called "The Widow and Orphan Friendly Society," praying for payment in full of the amount due to the society from the bankrupts, who were the society's bankers, on the ground that they were officers of the society, within the meaning of the act 4 & 5 *Will. 4*, c. 40, s. 12(a).

(a) "That if any person already appointed, or who may hereafter be appointed, to any office in a society established under this act, or the said recited act, and being entrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his said office or employment, any monies or effects belonging to such society, or any deeds or securities relating to the same, shall die, or become a bankrupt or insolvent, or have any execution or attachment or other process issued, or action or diligence raised against his lands, goods, chattels or effects, or property or estates heritable or moveable, or make any assignment, disposition, or other conveyance thereof for the benefit of his creditors, his heirs, executors, administrators or assigns, or other persons having legal right, or the sheriff or other officer executing such process, or the party issuing such action or diligence, shall, within forty days after demand made in writing by the order of any such society or committee thereof, or the major part of them assembled at any meeting thereof, deliver and pay over all monies and other things belonging to such society to such person as such society or committee shall appoint, and shall pay out of the estate, assets or effects, heritable or moveable, of such person all such sums of money remaining due which such person received by virtue of his office or employment before any other of his said debts are paid or satisfied."



By the rules of the society it was provided,

That the society should be under the direction of a treasurer, secretary, assistant secretary, two auditors, and a committee consisting of thirteen members.

That the treasurer, or any other member of the society, retaining in his hands any sum of money exceeding 10*l.*, belonging to the society, for the space of seven days after an order of the committee had been served upon him to pay the same over, should be excluded from the society.

By the same rules a certain banking firm were appointed the bankers of the society; but it was provided that any general meeting should have power to appoint other bankers, and that all monies from time to time accumulating beyond what the committee deemed necessary to be retained in the bankers' hands for the use of the society should be invested in the funds in the names of trustees.

The bankrupts were under the rules appointed bankers of the society in lieu of the banking firm originally named, and had in their hands at the time of their bankruptcy the sum of 368*l.* 3*s.* 8*d.* belonging to the society.

The bankrupts, *Phillips* and *Smith*, were two of four trustees of the society.

Mr. *Russell* in support of the petition. The only authority which can be cited against the petitioner is *Ex parte Whipham*(*a*), but the cases are materially different. In *Ex parte Whipham* the bankers were only employed occasionally, whereas in this case the bankers were appointed by name by the rules of the society, and the rules obviously mean that the treasurer should not hold in his hands more than 10*l.*, so that the bankrupts were

1845.

*Ex parte*  
*HARRIS.*

(*a*) 3 M. D. & D. 564.

1845.

Ex parte  
HARRIS.

in substance the treasurers; and being appointed in pursuance of the rules, must be considered as appointed to an office in the society, and having in their hands their monies by virtue of their said office or employment. In *Ex parte Whipham* the bankers were not so appointed, as they were employed only occasionally; there might be many days on which it might be said that the society had no bankers, and the constitution and rules of the society there did not require that there should be any.

Mr. *Chapman*, who appeared for the assignees, was not called upon.

The CHIEF JUDGE.—I am of opinion that the bankrupts were not persons appointed to any office in the society within the meaning of this act of parliament, which, being against common right, ought not to be extended in construction. If the legislature had meant that there should be a priority of payment in cases of this description, it would, I suppose, have said so plainly.

Petition dismissed, with costs.



Ex parte HARRIS.—In the matter of CLOSSON.

1845.

May 7.

THE bankrupt was a law stationer, and the petitioner claimed, as a clerk of the bankrupt, to be paid in full three months' salary, under the act 5 & 6 Vict. c. 122, s. 28. The Commissioner had disallowed the claim.

It appeared that the engagement of the petitioner took place simultaneously with a loan by him to the bankrupt of 550*l.* at interest, and that the terms of the loan and the petitioner's engagement as clerk were embodied in a written agreement, dated June 24th, 1844, according to which the petitioner was to receive a salary of 222*l.* 10*s.* a year, and the bankrupt agreed, in order that the petitioner might have the fullest knowledge of the trade affairs of the bankrupt, and keep true and correct accounts of the business, that he the bankrupt would make entries of all the business, and produce a balance sheet for the petitioner's inspection. The petitioner was also appointed the bankrupt's attorney to get in his debts and alone to draw cheques. If proceedings were taken to compel payment of the money advanced by the petitioner to the bankrupt, or if the money were paid, the petitioner's salary was to cease. If balance at any time was in the bankrupt's favour, he was to be at liberty to draw cheques not exceeding the balance. The petitioner was to be at liberty to join in the business as partner. The agreement was to be at an end upon payment of principal and interest upon the debt and the salary. The petitioner's duties were to be limited to the cash department.

In November, 1844, the petitioner became affected with asthma, and at the instance of the bankrupt ab-

ruptcy, with the bankrupt's sanction, did not take away this right.

A trader borrowed 550*l.* under an agreement by which the lender was to become his clerk at a salary of 222*l.* 10*s.* a year. The trader agreed to produce his accounts and balance sheet to the lender, who was to get in the debts, and alone to draw cheques on the banking account. If the balance was in the trader's favour at any time, he might draw to the amount of it. On payment of the loan, or on proceedings being taken to recover it, the agreement was to be at an end. The lender was to have the option of becoming a partner. On the trader becoming bankrupt, *Held*,  
1st. That the lender was a clerk entitled to payment of three months' salary in full.

2nd. That the circumstance of the clerk having been absent from business owing to ill health for the three months immediately preceding the bank-

1845.

Ex parte  
HARRIS.

sented himself on this account from the business, and had not returned to it in February, 1845, when the fiat issued.

Mr. *W. R. James* in support of the petition. Whatever remarks may be made on the unusual nature of the agreement, it cannot be denied that the petitioner was engaged and acted as the bankrupt's clerk. In that character he is entitled to payment in full; for the three months need not immediately precede the bankruptcy, especially where, as in this case, the clerk's attendance was interrupted by ill health, and at the master's recommendation.

Mr. *Allnutt* for the assignees. The agreement for a salary is obviously only a mode of paying a larger rate of interest on the loan. The clause determining the engagement on payment of the loan shows the nature of the transaction, and that the petitioner is a person advancing capital, and not a clerk within the scope or intention of the act. Besides, the petitioner was not employed during the three months for which he claims to be paid.

The CHIEF JUDGE.—I do not think that there was such an interruption in the service as to deprive the petitioner of his right to receive his salary for three months in full, if he can be considered to be a clerk within the meaning of the act. I will look into the agreement and mention the case again upon this point.

His HONOR on a subsequent day allowed the claim.



1845.

Ex parte JANE MEGAREY, HAMILTON WILLIAM MEGAREY and others.—In the matter of THOMAS MEGAREY.

THIS petition sought, among other things, the reversal of a decision of the Commissioner, who had rejected a proof tendered before him for the value of a contingent debt.

The grandfather of the petitioner, *H. W. Megarey*, by a codicil to his will, dated the 14th January, 1835, after reciting that he had by his will given and bequeathed to his two sons, *Hamilton Coslet Megarey* and the bankrupt, all the goodwill and benefit and advantage of the trades or businesses of a wholesale and retail coal merchant, which the testator then carried on, and all his stock in trade and particulars therein mentioned, and that he had also given and bequeathed unto his said two sons all the rest, residue and remainder of his real and personal estate, and reciting that he was desirous of making a further provision for the petitioner, *Hamilton William Megarey*, in case he should live to attain the age of twenty-one years, declared his will and mind to be that his said sons, *H. C. Megarey* and the bankrupt, should admit the petitioner, *H. W. Megarey*, on his attaining the age of twenty-one years, into full participation and advantage of one-third of the stock and profits of the said business of a wholesale and retail coal merchant, as a partner jointly with them his said sons or the survivor of them, and in default thereof should pay unto the petitioner, *H. W. Megarey*, the full sum of 1000*l.* on his attaining the said age of twenty-one years. And the testator directed the trustees and executors

May 7.  
A father bequeaths his business and stock in trade to his sons, with a declaration that a grandson, then an infant, should be admitted into the firm on attaining twenty-one, or in default thereof that the sons, or the survivor of them, should pay the grandson 1000*l.* on his attaining twenty-one. On the bankruptcy of the surviving son before the grandson attained twenty-one, held, that there was a right of proof for the 1000*l.* as a contingent debt.

1845.

Ex parte  
MEGAREY  
and others.

named in his will, or the survivor of them, his executors or administrators, within six calendar months following his decease, to require and obtain from his said two sons a bond in a sufficient penalty, in the usual form, and conditioned and obligatory on them, or the survivor of them, his executors or administrators, in the event of the petitioner, *H. W. Megarey*, attaining the age of twenty-one years, to take and admit him into full participation and benefit of one-third of the said stock and profits of the said business of a wholesale and retail coal merchant, as a partner, or, in default of so doing, to pay unto him the petitioner, *H. W. Megarey*, his executors or administrators, the full sum of 1000*l.*, within six calendar months next following the period of his attaining the age of twenty-one years.

The testator's son, *H. C. Megarey*, was long since dead.

The petitioner, *H. W. Megarey*, was still an infant, and an order had been obtained that the trustees of the will should be at liberty to go in and make such proof as they could establish for, among other things, the value of the contingent debt or legacy of 1000*l.*, by the above mentioned codicil directed to be paid to the petitioner, *H. W. Megarey*, in the event therein mentioned.

In prosecution of this order, the debt or legacy was valued at 693*l.* 17*s.*, and the trustees tendered a proof for that amount. But the Commissioner rejected the proof, on the ground that he did not consider that the contingent legacy could be considered as a contingent debt within the meaning of the 6 *Geo.* 4, c. 16, s. 56(a).

*Mr. Rogers* in support of the petition.

(a) See *ante*, p. 107, note (e).

Mr. *Swanston* and Mr. *Chandless* for the assignees.  
It is not certain that the debt will ever become due, for the bankrupt may resume his business and admit the petitioner into partnership on his attaining twenty-one, or the petitioner may die under that age, in neither of which cases would the money be payable, and a contingency of this kind is not capable of valuation, *Ex parte Myers (a)*.

1845.  
Ex parte  
MEGARRY  
and others

Mr. *Rogers* in reply was stopped by the Court.

The CHIEF JUDGE.—The bankrupt, before his bankruptcy, took possession of his father's business of a coal merchant, and the stock belonging to it, upon certain conditions, and doing so, he became personally liable to fulfil those conditions. One condition which he thus became personally liable to fulfil was this, that in the event of a grandson of the testator then and still a minor attaining his majority, he was to admit that grandson into full participation and benefit of one-third of the stock and profits of the business as a partner, and in default thereof to pay to him the sum of 1000*l*. During the minority, the person who was under this condition became bankrupt, by which, in my judgment, for every substantial and practical purpose, it became impossible to fulfil one branch of the condition, namely, to admit the testator's grandson into full participation and benefit of one-third of the stock and profits of the business. The Court is not to look at the possibility, whether probable or improbable, of this subsisting bankruptcy being superseded hereafter, or to the possibility, whether probable or improbable, of the bankrupt continuing in business, or

(a) M. & B. 222, and 2 D. & C. 251.

1845.

Ex parte  
MCGAREY  
and others.

resuming business. Of continuing it, there is hardly a possibility, for where there has ever been an effectual bankruptcy, I apprehend that any trade carried on by the bankrupt must be considered a new trade, and not a continuation of the old trade for the purpose of this argument. The case is open to this observation, that the event which rendered the payment of the 1000*l.*, subject only to one contingency, namely, the infant's attainment of the age of twenty-one, happened not before the bankruptcy, but *eodem instanti* with the bankruptcy; and it is a general rule that a man cannot enter into a contract depending on the event of his own bankruptcy(*a*). But there are exceptions to this rule; one is, where a man on his marriage receives a certain amount of fortune with his wife in settlement or otherwise, and contracts in her favour, in the event of bankruptcy, to the extent of her fortune; that may be maintained(*b*). My opinion is, that a similar principle has application here, and that the obligation upon the bankrupt arose in respect of assets of sufficient amount, which he obtained from another quarter. Viewing it, therefore, in the strictest way, it became a valid obligation. It seems to be admitted at the bar, that if this is to be viewed as a mere legacy the claim accrued, but I have assumed, though without deciding, that it is not a legacy, and is a mere case of personal obligation. Viewing it in this way, and in reference to the valuable consideration I have mentioned, I am of opinion that this case is to be treated, for the purposes of proof, as one of personal

(*a*) *In re Murphy*, 1 Sch. & Lef. 144.

(*b*) *Ex parte Cooke*, 8 Ves. 353.



liability on the part of the bankrupt to pay 1000*l.* to A. B. when he shall attain twenty-one, if he shall live to attain twenty-one.

1845.

*Ex parte*  
MCGARRY  
and others.

The Order as to the legacy of 1000*l.* bequeathed to *H. W. Megarey* was, that the trustees be at liberty to go in under the fiat and prove for 693*l.* 17*s.*, as the value of the contingent debt or legacy, and that the Commissioner should receive and admit the proof accordingly, and that the dividend on the proof should be invested and carried to an account in trust in the bankruptcy the account of *H. W. Megarey*.

*Ex parte* JUDITH GEORGIANA MONTEFIORE  
and ESTHER HANNAH MONTEFIORE.—In  
the matter of JOSEPH BARROW MONTE-  
FIORE.

THIS was the petition of two daughters of the bankrupt, praying that the bankrupt might be at liberty to make such proof against his own estate as he might be able to establish in respect of principal and interest on the gains made upon two legacies bequeathed to the petitioners, which the bankrupt had received on their behalf.

In April and July, 1830, the bankrupt, who was then residing in Sidney, New South Wales, with his family, received by his drafts upon the executors in England of a Miss *Rebecca Barrow*, three several sums of 53*l.* 9*s.*

*Westminster,*  
*June 4.*

Executors pay the legacies bequeathed to infants to their father, who invests them on colonial securities, and makes large profits, and becomes bankrupt. *Held*, that the legatees were entitled to have proof made upon the whole amount of the profits.

1845.  
  
 Ex parte  
 MONTEFIORE.

6*d.*, 19*s.*, and 107*l.* 15*s.*, in respect of two sums of 75*l.* each bequeathed by the testatrix for the benefit of the bankrupt's two daughters, *Judith Georgiana Barrow Montefiore* and *Esther Hannah Barrow Montefiore*, then and still infants. The bankrupt made various investments of the sums so received by him in different securities of the colonies of Australasia. Upon making up and stating the account of the profits made by those investments up to the time of the bankruptcy, there appeared to be due from the bankrupt in respect of the monies received by him on behalf of his two daughters, according to the usual course of business in such cases, a balance of 1103*l.* 6*s.* 5*d.* The bankrupt deposed that he received the three several sums of money and made the several investments and sales and reinvestments thereof as trustee for and on behalf of his two daughters; and that from the time of his receiving the sums of money till the bankruptcy due and regular entries were made in the bankrupt's books, to an account opened and continued in the names of his two daughters, of the receipt of the sums of money and of the investments, sales and reinvestments thereof, and of the bankrupt's other receipts and payments in respect of the same.

Mr. *Rogers* in support of the petition.

Mr. *Swanston* for two of the assignees.

Mr. *Hayes* for the two other assignees. This is not a proof against the estate of a trustee. The money was advanced whether properly or improperly by the executors to the bankrupt, the result of which was only to make the bankrupt a debtor to the executors for the amount. Granting then that the legatees have a right

to prove without the intervention of the legal creditors, the executors, still all they prove for is principal and interest on the sums advanced, and not the immense profits which the bankrupt states himself to have made. It would be a most dangerous precedent to allow a bankrupt to give a preference to his own children, by attributing the profits he may have made to the money which he owed them.

1845.  
Ex parte  
MONTEFIORE.

The CHIEF JUDGE.—An executor properly or improperly pays legacies to the father of infant legatees. The father deals with the money and makes investments, which are not in the ordinary course, and becomes bankrupt. The cestuis que trustent have a right to elect between the principal and interest and the benefit of the investments. The amount of this benefit must be investigated before the Commissioner. Let the bankrupt be at liberty on behalf of his children to establish such proof as he may be able in respect of the profits made by the investments.



Ex parte MOORE.—In the matter of WALTER WESTROP and THOMAS MARTIN COCKSIDGE.

Lincoln's Inn,  
June 25, and  
July 1.

THIS was a petition of appeal from the rejection of a proof by the Commissioner under the following circumstances:—

Where a husband sued his wife in an Ecclesiastical Court for a divorce on the

ground of adultery, and before any monition for costs, taxation, or any bill of costs corrected, or any decree, order or sentence, the husband became bankrupt and discontinued the suit: Held, that the wife's proctor might prove against the husband's estate for the amount of his bill of costs. The whole of the costs of executing a commission to examine witnesses, sued previously to but closed after the act of bankruptcy, held to be proveable.

1845.

Ex parte  
MOORE.

The bankrupt had, before his bankruptcy, commenced a suit against his wife in the Consistory Court of London for a divorce *a mensâ et thoro* on the ground of adultery. In this suit the wife employed the petitioner as her proctor, and it was in respect of his bill of costs that the proof in question was tendered.

The petition stated that, in pursuance of the usual practice, the petitioner made out his bill of costs for the proceedings taken by him on behalf of the bankrupt's wife down to the end of October, 1844, and the bill was duly taxed by Dr. *Lushington*, the Judge of the Court, at 348*l.* 9*s.* 5*d.*, and that the petitioner also obtained an order for a monition to issue for the payment thereof, in the event of the bankrupt failing to pay the said costs.

That a monition had some time previously issued for the payment to the wife of certain alimony, which had been decreed to her in the suit, and the husband had failed to pay such alimony pursuant to the tenor of the monition, and therefore the petitioner, as the proctor of the wife, prayed the Court to pronounce the husband in contempt for nonpayment of such alimony, and to issue the usual *significavit*, for the purpose of enabling a writ *de contumace capiendo* to be taken out thereon.

That therefore the proctor for the husband alleged that he the husband had been gazetted as a bankrupt, and that assignees of his estate had been appointed under his bankruptcy, and his said bankruptcy not being disputed, the said Court refused to pronounce him in contempt or to make any order for the issuing of a writ of *significavit*.

That the reason assigned by the Consistory Court for refusing to pronounce the husband in contempt, and to

grant the writ of *significavit* was, that as the law had, by vesting all the bankrupt's property in other parties, taken away his means of paying the amount of such alimony, it would not be right to make an order which might have the effect of imprisoning him for nonpayment of such alimony.

That as the reason so assigned by the Court would apply equally to an application for pronouncing the bankrupt in contempt, and for the issuing of a *significavit* for nonpayment of the costs, the petitioner did not apply to the Court for that purpose.

That the bankrupt had since the bankruptcy duly authorised his proctor by proxy to declare, and his said proctor had accordingly declared, that the bankrupt would not proceed further with the suit, and that a minute of such declaration had been duly recorded in the acts or proceedings of the said Court; but the wife being entitled according to the practice of the Court to have the said cause continued with a view to the vindication of her own conduct, had refused to allow the same to be abandoned, and that she altogether denied the charges made against her by her husband.

That under these circumstances the petitioner, on the 10th of April, 1845, tendered his proof against the separate estate of the husband for 348*l.* 9*s.* 5*d.*, the amount of his taxed costs incurred previous to the bankruptcy, but that the Commissioner refused to admit the proof on the ground that, before he could decide whether the husband would have been liable, he must have enough before him to convince him that the wife had good ground for defending the suit, which could not be done until the suit for a divorce was decided.

That according to the practice of the Ecclesiastical

1845.

Ex parte  
MOORE.

1845.  
Ex parte  
MOORE.

Court, the husband, in all matrimonial causes, is liable to pay all the costs of the suit as well on the part of the wife as of himself, and without reference to the result of the suit.

That the payment of the costs incurred by the wife in such causes is usually enforced against the husband by the proctor for the wife having his bills taxed by the Court, and then obtaining an order (usually called a monition) for the payment thereof, which is served upon the husband, and in case of nonpayment thereof by the husband pursuant to the terms of the monition, he is pronounced in contempt, and thereupon a *significavit*, or writ signifying the contempt, issues from the Ecclesiastical Court, directed to the Queen's most excellent Majesty, upon which a writ *de contumace capiendo* issues out of the High Court of Chancery, by virtue of which the husband is attached and remains in custody until he purges his contempt by payment of the costs.

That the proctor for the wife is not bound to wait till the determination of the cause before he proceeds so to enforce payment of his costs against the husband, but is entitled from time to time, and at any time before the signing of the definitive sentence in the cause, to have his costs so taxed, and an order or monition for payment thereof issued as aforesaid.

That the husband in such causes becomes legally indebted to the proctor for the wife in the amount of the costs of the said proctor in respect of his proceedings on behalf of the wife.

Mr. *Swanston* and Mr. *Rolt* in support of the petition. The proctor's bill was a debt due from the husband at the time of issuing the fiat, for in a suit of this kind, ac-

cordova to the practice in the Ecclesiastical Court, the wife's proctor may *prorect* his bill and obtain taxation *de die in diem*. This right is altogether independent of the merits or events of the suit, and exists in all cases except when the wife has separate property of her own, and as was laid down in *Davis v. Davis*(a). The principle on which the rule is founded is that, under the antient law of the country, the wife is supposed to have no separate property. And in *Wilson v. Wilson*(b), Sir W. Scott said, "in suits instituted either by the husband and wife (for I consider that to be indifferent), the wife is privileged as to costs and alimony, and on the same principle that the whole property is supposed by law to be in the husband."

1845.  
  
 Ex parte  
 Moore.

In *Cheale v. Cheale*(c), where the wife was the suitor, and died during the suit, and the proctor prayed costs against the husband, the judge said, "the object of the law in permitting a *de die in diem* taxation was to obviate the inconvenience and delay that may otherwise arise in the progress of the cause, from the wife's want of funds to meet the costs." Here the proctor forbore at the proper time to procure such taxation, and the Court cannot now assist him; his appointment is extinct. "No precedent has been furnished me of a proctor suing a husband in these Courts for costs, he may perhaps have a remedy at common law." Although no case may be found confirming this supposition of the learned judge, there is none contradicting it, while principle is entirely in its favour. There are two grounds on which it may be supported.

(a) Cited in note to 2 Hagg. Consist. Rep. 204.

(b) 2 Hagg. Consist. Rep. 203.

(c) 1 Hagg. 374.

1845.

Ex parte  
Moore.

First. That the proctor is retained by the wife at the compulsion of the husband, and that she is thus constituted his agent so as to be competent to render him liable.

This appears from the terms of the citation to the wife, which are as follows :

“ *Charles James*, Bishop of London, to all clerks, &c. We command you jointly and severally peremptorily to cite, or cause to be cited, *Ann Cocksedge*, of, &c., to appear personally or by her proctor duly constituted, before, &c., then and there to answer *Thomas Martin Cocksedge*, of, &c., in a certain cause of separation, &c.”

The husband therefore orders the wife to employ a proctor, and thereby enters into a contract to pay him.

Secondly. That the proper means of defence to such a charge as was here made against the wife must be considered to be necessary for her. To say that this shall depend on the event of the suit, and that the proctor shall only be entitled in case of the defence being successful, would be practically to deprive the wife of the means of defending herself. No respectable practitioner would undertake a case on such terms.

The circumstance of the Ecclesiastical Courts affording no remedy for the proctor against the husband in a case of this kind, shows that the remedy must be in the ordinary courts of law ; for it is impossible to argue that he is to be without a remedy. This inference receives confirmation from the distinctions which exist in the Ecclesiastical Courts. In testamentary cases, for instance, the unsuccessful party is condemned in costs ; the decree orders him to pay them for this reason, that he would be under no obligation to pay costs except he were so ordered. In



matrimonial cases there is no condemnation in costs, the proctor applies to have the wife's bill taxed before there is any decree of the Court in the suit. Another distinction is, that in all cases, except matrimonial cases, the costs await the result of the suit. The reason of these differences can be no other than that there exists the common law liability of the husband to pay his wife's costs in matrimonial causes, and that in other cases there is no liability except that which the sentence of the Ecclesiastical Court itself creates. In one case the Ecclesiastical Court only enforces a liability, in the others it both creates and enforces it. [The *Chief Judge*. Suppose a condemnation in costs, could the costs be recovered in an action ?] There is no case or authority in which that question has been raised. It is impossible to understand how a court of law can hold that a party may recover upon a foreign judgment, and not in such a case as this. Even in a suit for nullity of marriage the man has to pay the woman's costs in the Ecclesiastical Courts, though the marriage is declared void. They cited *Bird v. Bird* (a).

1845.

Ex parte  
MOORE.

Mr. *Russell* and Mr. *Amphlett* for the assignees. There was no debt at the time of the bankruptcy, the costs not having been taxed (b). The case put of a suit for nullity of marriage shows that the practice of the Ecclesiastical Court in directing payment *de die in diem* is no criterion of a right to sue at law, for there it is clear that the proctor could not recover against the man. The fact is merely that the Ecclesiastical Courts stay

(a) Lee's Cases, 209.

(b) See *Ex parte Crosse*, 2 M. D. & D. 308.

1845.

Ex parte  
Moore.

the proceedings unless the husband pays the bill of the wife's proctor; but no authority can be produced to show that this creates or demonstrates a legal right, it seems on the contrary to indicate that there is none, and that therefore the Ecclesiastical Court is obliged to resort to this mode of enforcing payment in the absence of any other. An argument, which is further supported by the cases referred to on the other side, of *Davis v. Davis*, and *Wilson v. Wilson*, because by these cases it is established that, where the proctor has the means of obtaining satisfaction of his demand by any ordinary process of law or equity, as when the wife has separate property, the right to have the bill taxed *de die in diem* as against the husband does not exist. [The *Chief Judge*. Does it necessarily follow from the wife having separate property that the proctor would have a lien or claim upon it?] It could hardly be possible to conceive a case in which he would not, having regard to the principles laid down in *Owens v. Dickenson* (a). In cases of alimony the decree of the Court creates no such debt as can be the foundation of proceedings at law or in equity, *Stones v. Cooke* (b). It is true a Court will grant a *ne exeat regno* to secure arrears of alimony, but it will not decree payment. In the passage cited on the other side from Sir *W. Scott's* judgment in *Wilson v. Wilson*, the Court obviously considered payment of costs and of alimony to be upon the same footing. The relation of debtor and creditor did not exist between the bankrupt and the proctor at the date of the fiat. The liability of the husband for necessities supplied to the wife has hitherto

(a) Cr. &amp; Ph. 48.

(b) 7 Sim. 22, and 8 Sim. 321.

been confined to what was necessary for her subsistence. In the case of a successful indictment by the wife against the husband for assault, where it has been decided that the husband is not liable, *Grindall v. Godmond* (a), Lord *Denman* there said, "It is impossible to say that under any circumstances a prosecution of the husband is necessary for the wife." It is true that he is liable in a proper case of her exhibiting articles of the peace against him, *Sheppard v. Mackoul* (b), *Turner v. Rooks* (c), but then the Court looks into the merits of the case. They also cited *Bevir v. Bevir* (d).

1845.

Ex parte  
Moon.

Mr. *Swanston* in reply.

*Cur. adv. vult.*

The CHIEF JUDGE.—In this case the petitioner, a proctor, seeks to prove against the separate estate of one of the bankrupts, Mr. *Cocksedge*, the amount of a bill of costs incurred before that gentleman's bankruptcy in the Consistory Court of London.

July 1.

The matter arose thus : Mr. *Cocksedge* sued his wife in that Court for a divorce on the alleged ground of adultery. She appeared and defended the suit by the petitioner as her proctor, and certain proceedings having taken place in the suit after her appearance, costs and expenses were thus incurred in it upon her part, the amount of which, had she been *sui juris*, would plainly have been a just debt from her to the petitioner; but as she was not *sui juris*, I suppose that the petitioner, unless he had a demand for them upon the husband, had

(a) 5 Ad. & Ell. 755.

(c) 10 Ad. & Ell. 47.

(b) 3 Campb. 326.

(d) 3 Phillim. 261.

1845.

  
Ex parte  
MOORE.

not a demand for them upon any person. These costs and expenses were obviously occasioned by the husband's act, in this sense, that the suit was of the husband's institution, that she was justly entitled to defend it, at least, if innocent; that she has not been proved guilty, and that if entitled to defend the suit she was entitled, if not obliged, to defend it by means of a proctor.

These costs and expenses having been thus incurred, the husband pending the cause became bankrupt, but before the bankruptcy there had not been any monition for costs, any taxation of costs, or any bill of costs *pro-rected*, or any decree, sentence or order of any kind, as I understand.

The circumstances that it is material next to state may be stated in the language of the petition, which, as I collect, is accurate in this respect. [His Honor read the statements of the petitioner as to this to the effect before stated.]

The question before me is as to the correctness of this conclusion of the learned Commissioner. Upon which it may be right to bear in mind, that if the husband is not now as liable to pay the bill, as it is in the power of the Consistory Court to make him, and subject to all the remedies for it within the ability of that jurisdiction to confer, the bankruptcy alone has relieved him from this situation; and that, as the case seems to have stood, had the petitioner chosen to have been more active, he might have obtained from the Court, I suppose, at any period after the wife's appearance in the suit, a taxation of her costs for the time being incurred in the suit, and a monition for them against the husband before the bankruptcy.

There is no evidence that she has or had any separate

property, a point, as to the materiality or immateriality of which, for the present purpose, I say no more than that the absence of any such evidence is not, in my opinion, prejudicial to the petitioner's case.

Nor is there any evidence that she has at any time confessed adultery, or, as I have stated, that she has been guilty of adultery. Ought I, however, for the present purpose as between the petitioner and the assignees, who are strangers to the proceedings at Doctors Commons, subsequent to the bankruptcy, to assume her innocence, the suit not having been abandoned until after the bankruptcy? I am of opinion that I ought. I am of opinion, that it would not be right for me to consider her as having been otherwise than unjustly sued. The assignees might before the learned Commissioner, or on this proceeding, have proved, if they could, that she had confessed or was guilty of adultery. I understand her to have uniformly denied the charge.

An unjust suit then, involving her station in society—her subsistence and her honor—was brought against her by her husband, who himself thus compelled her either to defend the suit, or, by omitting all defence, to forego all claims upon his support, and the countenance of society, and become in effect a pauper and an outcast. Was it reasonable and proper that she should defend such a suit?

To that but one answer can be given. Was the defence necessary to her? It may be true, that to be slighted and shunned may be an evil viewed variously, and of more or less weight in various cases, but who can dispense with food and raiment? If these are necessities, it may be thought not very reasonable to treat resistance to the unjust abstraction of the means of obtaining them as a matter of fancy or superfluity.

1845.

Ex parte  
MOORE.

1845.

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Ex parte  
MOORE.

Surely her defence of the suit was necessary to her as well as reasonable and proper, and that she should employ a proctor for the purpose was equally reasonable—equally proper—and equally necessary; for if she could have defended the suit in person, she certainly was not bound to do so. Why then is it not to be considered that the husband was at the time of the bankruptcy legally indebted to the petitioner in the amount of his bill to that time? If the husband was so, there is certainly a right of proof for that amount under the bankruptcy.

The bill, in my judgment, was as much for necessaries properly furnished to the wife, as a bill for ordinary provisions and clothing or medical attendance could have been. It was surely not less justly chargeable on the husband than the costs of an attorney employed by her to defend her against an indictment for a crime would have been, if she had been falsely accused, and her husband had refused to interfere. A man causelessly turning his wife out of doors sends her into the world with credit against him for necessaries; the baker, the coal-merchant, and other such tradesmen employed by her become his creditors accordingly. If he causelessly sue her in an Ecclesiastical Court for imputed adultery, he gives her (in the same way) credit with a proctor, who employed by the wife becomes likewise the husband's creditor, as it seems to me.

I do not think it material to decide (if I could) or to consider, whether in all cases of costs, such as that before me, the rules and practice of the ecclesiastical jurisdiction afford to the wife and her proctor, or either of them, sufficient remedy and complete protection; whether in every case where reason or justice requires that either of them should be assisted against the husband as to

costs, that assistance can there be obtained, or whether there may not be cases in which, though the Ecclesiastical Court would interfere, proceedings at common law, including the forms of execution, which the law gives in actions, may be substantially more convenient and advantageous than process upon a sentence, decree or monition of the ecclesiastical judge.

I am not aware of any objection in point of authority or principle to holding that remedies in each jurisdiction may simultaneously exist in such cases. There may very possibly be an objection to their simultaneous use, or to resorting to one after having resorted to the other; but no such thing has occurred, as I conceive, in the present instance, for I cannot view in that light the steps taken after the bankruptcy by the petitioner, who has not obtained or applied for a *significavit* as to the costs; nor again can it in my judgment be a sufficient answer to an action by the proctor against the husband, to say that the case is one in which the ecclesiastical judge had refused, or would, on the ground of the wife having separate property or otherwise, have refused to interfere against him.

The common law right to sue a man for necessaries furnished to his wife, or upon a cause of action tantamount, cannot I think be affected by the question whether the Consistory Court would or would not have given, or could or could not give, to the plaintiff remedy and redress according to its forms and functions.

It is arguable that there may be inconvenience in allowing actions to be brought from time to time by a proctor for his costs pending a divorce suit. There may be so, although the Ecclesiastical Courts sometimes, indeed often, I believe, make the husband pay the wife's

1845.

  
Ex parte  
MOORE.

1845.

  
Ex parte  
Moore.

costs step by step, or as they say there *de die in diem*. I do not, however, know that there can substantially be greater difficulty or inconvenience belonging to such a case than to an ordinary case of attorney and client as to costs. In the present instance, the husband's bankruptcy happened pending the suit; but nothing can be more common than that a party to an action should become bankrupt pending the cause. His attorney in such circumstances, at least if not guilty of neglect or misconduct before or afterwards, is surely entitled to prove under the bankruptcy for his costs, incurred by the client before the bankruptcy, whether the cause do or do not proceed, or however it may end.

No neglect, no collusion, no misconduct, no litigiousness or vexation, has been imputed to the proctor in the present instance. The suit has been ended since the bankruptcy, as far as it sought to criminate the wife, and ended by what is, I suppose, analogous to a nonsuit at law in her favour. Put the case of a defendant in an action becoming bankrupt, but not pleading or suggesting his bankruptcy, the action going on, the plaintiff nonsuited and being a beggar. Is the defendant's attorney not to prove his costs up to the bankruptcy against the estate of his client?

I am quite aware that, in the present instance, the husband was not the client of his wife's proctor; but on the grounds to which I have referred, and for the purpose before me, I see no substantial difference between the two cases, and, setting bankruptcy out of view, an attorney or solicitor, though, abandoning his client's cause during its progress, may, in certain circumstances, lose his right to demand the previous costs against the client, yet, not abandoning the cause, not



ceasing to act, may during its progress, I suppose, from time to time demand from the client and sue the client for payment of his costs for the time being incurred, at least, if this be not done with vexatious and unreasonable frequency. I am not aware of there being authority or principle against this position.

But I find the Lord Chief Justice of the Common Pleas, in a case (a) in that Court in the year 1832, saying, "The objection, however, which has been raised to the plaintiff's recovery is, that an attorney cannot sue for his bill till the business which he has been retained in is terminated. It would be long before I should be induced to assent to such a proposition." And again, "There is no authority for the proposition on which the defendant relies." There is another report (b) of the same case, in which the Lord Chief Justice is represented as saying, "The main objection to the plaintiff's right to recover, and the question for our consideration is, whether an attorney can bring an action against his client for business done during the progress of a cause, or whether he must wait till the suit has arrived at a final determination, viz. by a judgment at law, or decree in equity, before he can sue. I should require a strong authority before I acceded to such a proposition, for, if an attorney or solicitor is bound to wait till the final determination of the suit, he might in many cases be ruined." And Mr. Justice *Bosanquet* is mentioned as stating "that he could not agree to the extent of the proposition contended for by the defendant, that an attorney could not sue his client for business done till the final termination of the suit."

1845.

Ex parte  
MOORE.

(a) *Van Sandau v. Browns*, 9 Bing. 407.

(b) 2 Moore & Scott, 656.

1845.

  
Ex parte  
MOORE.

I may add, that if proof of the wife's adultery in an action by her proctor against the husband for her costs of a divorce cause, pending that cause, would defeat the action (a point, as to which I say nothing), and if that would be inconvenient, such an inconvenience is not of a new kind, it being clear that a husband, suing for a divorce, may at the same time be a defendant in an action, or various actions by various plaintiffs, in which, as well as in the ecclesiastical suit, the point to be tried may be the wife's adultery.

How the present matter would have stood, had the wife been guilty, had the suit against her for a divorce been still in progress, or had she been the party suing and not the party sued, in the proceedings that existed before the bankruptcy, it is unnecessary to say. As the facts are, I think the proctor entitled to prove, and I so decide.

The point being of some importance, and specifically, so far as I am aware, new, I had doubts whether I ought to allow the proof (especially against the opinion of the learned Commissioner), without affording the assignees the opportunity of trying the question in an action which might probably be so framed as to try it satisfactorily. But considering the amount of the sum in dispute, and that they may possibly obtain the opinion of the Lord Chancellor, if they appeal speedily from my decision, before the long vacation, I have thought it better for both parties that I should act upon my own opinion without further delay.

In what I have said I have assumed that the amount of the bill is considered by the assignees reasonable and fair, and that there is not any dispute what charges are anterior and what subsequent to the bankruptcy. If

there is any difference between the parties on these points, or either of them, I will decide it myself, or put it into a course of investigation as may appear best.

Let the costs of the petition to this time on each side come out of the estate.

Mr. *Swanston* and Mr. *Rolt* said there was one item on which it was necessary to ask the opinion of the Court. It was the amount of the costs of executing a commission for the examination of witnesses in Dublin. The Commissioners finished the examination on the day on which the act of bankruptcy was committed; on the following day the fiat issued, and on the same day the commission was closed. Under these circumstances the item must be considered to have been incurred before the bankruptcy.

Mr. *Russell* and Mr. *Amphlett*. There was no debt before the act of bankruptcy, and consequently there can be no proof upon this item, or at all events only for a portion of it.

The CHIEF JUDGE.—I am of opinion that for the purpose of proof, this part of the debt must have relation to the issuing of the commission, and that whole amount of the item is proveable under the fiat.

1845.

Ex parte  
MOORE.

1845.

*Lincoln's Inn,  
July 2.*

The right of assignees to inspect or take a copy of a title-deed of the bankrupt's property in the hands of his solicitor, is no higher than the right of the bankrupt himself, and therefore, where the assignees petitioned that the solicitor might produce or give an attested copy of such a document, on being paid only the portion of his costs relating thereto, and the costs of the production or copy, the petition was dismissed with costs.

Ex parte JOSEPH UNDERWOOD, JOSIAH TIBBS and PATRICK JOHNSON. — In the matter of HENRY WILLIAM HEMSWORTH.

THIS was the petition of the assignees, praying that the respondents, Messrs. *Plucknett* and *Roberts*, who had been the bankrupt's solicitors before the bankruptcy, might deposit with the official assignee a bill of sale of a ship, executed to the bankrupt as mortgagee, for inspection, without prejudice to the respondents' lien on the document.

The respondents had prepared the bill of sale by way of mortgage to the bankrupt, and they had acted as his solicitors in a foreclosure suit instituted by him against the mortgagor of the ship. They had also acted generally as his solicitors, and their bill of costs amounted to 900*l*.

The assignees had put up the ship for sale under the fiat, and by the conditions of sale engaged to give the purchaser an attested copy of the bill of sale.

At the sale the ship was knocked down for 1600*l*., and the assignees applied to the respondents to produce the bill of sale, offering to pay the respondents' costs of preparing it and of the foreclosure suit and otherwise relating to the vessel, and of the production of attested copies of the bill of sale; but the respondents declined producing the document, unless the full amount of their bill was paid.

On April 5th, 1845, the petitioners caused the respondents to be served with a summons, requiring them to appear before the Commissioner and to bring the bill of sale, that the same might be inspected, and an attested

copy taken. One of the respondents attended before the Commissioner, and refused to produce the bill of sale, alleging, upon oath, that he and his partner acted as attorneys for the bankrupt from the year 1840 to the time of the bankruptcy; that the bill of sale was placed in his hands immediately after its execution; that there was no agreement in writing between the respondents and the bankrupt relating thereto, and that he refused to produce it or allow a copy to be taken, as the lien of himself and partner would be defeated thereby. The purchaser of the ship had given notice that he should require compensation for the delay in completing the purchase, as he had thereby lost a voyage which he contemplated, and he had also given notice that he should abandon the contract.

The respondents submitted to the jurisdiction of the Court.

*Mr. Russell and Mr. Thomas Parker* in support of the petition. The question is whether, if a document of title is in the hands of the bankrupt's solicitor, the solicitor may say to the assignees, "you shall not look at the document without paying me my bill." If there be no bankruptcy the law is, that a solicitor, who discharges himself from being a party's solicitor, cannot exclude his client from the inspection of his papers, but that if the client voluntarily determines the relation a different rule prevails, the Court saying that the client shall not use the papers unless he pays the solicitor. Here neither of these state of things exists; the solicitor has not discharged himself, nor has the client discharged him, but the law has put an end to the relation. They

1845.

Ex parte  
UNDERWOOD  
and others.

1845.  
  
 Ex parte  
 UNDERWOOD  
 and others.

cited *Ross v. Laughton*(a), and *Brassington v. Brassington*(b). The doctrine of lien cannot be carried further than it is in the case of mortgagee, who can be compelled by the Commissioner to produce his mortgage deed (c).

Mr. *Swanston* and Mr. *Giffard* for the respondents were stopped by the Court.

The CHIEF JUDGE.—It is possible, that in a case of this description, a solicitor may have conducted himself so as to prejudice his lien by the general law. I assume that here there has been no such conduct. In such a case, independently of the bankruptcy, there would be no question, and the only point is, whether the bankruptcy makes any difference, that is, whether the rights of the assignees are higher than those of the bankrupt.

How the case might have stood if the documents in question had been documents belonging to a cause, or to any proceeding in a court of justice, I do not say; I abstain from giving any opinion on the point. This is simply a title-deed, and with regard to a title-deed, I am of opinion that bankruptcy makes no difference, and that the rights of the assignees are no higher than those of the bankrupt. The solicitor stands substantially in the situation of a solicitor discharged, not by his own act, not by his own choice, or from his own fault. That is the position in which he stands here.

Then there remain two questions, if the first can be called a question; first, whether there has been any evi-

(a) 1 V. & B. 349.

(c) See *Ex parte Caldecott*, Mont. 55.

(b) 1 Si. & Stu. 455.

dence of such conduct on the part of the respondents as would prejudice their right. If it be wished to raise that point, I will allow it to be raised. Next, whether a solicitor having a lien on the client's title deeds can be compelled to give copies of them to the client, without receiving the amount of his bill of costs.

As further argument is not desired, the petition must be dismissed, so far as it prays that the respondents may be ordered to deposit the bill of sale with the official assignee, and all I have to consider is the latter of the two questions which I have mentioned.

If a client is entitled to say to his solicitor, "give me a copy of my title-deed and I will pay for it," and is at the same time at liberty to decline paying the solicitor's bill of costs, the lien of the solicitor may be worth little or nothing.

I think I ought not to make any other order on this petition than to dismiss it with costs, to be paid out of the estate. I attribute no blame to the assignees, and give no opinion whether the respondents might be examined before me, as exercising the same functions as a Commissioner. I consider the submission of the solicitors to extend to the whole merits of the case.

Petition dismissed, with costs out of the estate.

1845.

Ex parte  
UNDERWOOD  
and others.

1845.

*Lincoln's Inn,  
July 7th.*

**Ex parte GEORGE HENRY BARNETT' and others.**

—In the matter of JOHN REAY and JOHN ROBERT REAY.

1. A trader deposits policies of assurance with his bankers to secure the floating balance due from him, and signs a memorandum of the object of the deposit, of which notice is given to the insurance office. Afterwards he takes a partner, and the policies remain, and are treated as a security for the floating balance due from the firm; but of this change in the object of the security, no memorandum is signed, nor is any notice given to the office. On the firm becoming bankrupt, *Held*, that the bankers were entitled to the usual order as in the case of an equitable mortgage without a written memorandum.

2. A mortgagee of a policy of assurance, deposits it by way of submortgage, and gives notice of the submortgage to the insurance office, but not to the original mortgagor: *Held*, that this was sufficient to take the policy out of the reputed ownership of the mortgagee.

3. A bond which is executed to secure the payment of bills of exchange, is mortgaged together with the bills, which are endorsed. Afterwards the mortgagor deposits the bonds and the bills by way of submortgage, and becomes bankrupt, no notice of the submortgage having been given to the obligor. *Held*, that the submortgage was good against the assignees.

4. Deposit, by way of mortgage, of a land order of the New Zealand Company *held* to be good, without notice being given to the company of the deposit.

**THIS** was a petition for the usual order in the case of an equitable mortgage.

On January 26, 1843, the bankrupt *John Reay* deposited with the petitioners, who were his bankers, two policies of assurance, effected in the Economic Life Assurance Office, on the lives of two individuals therein named, and also a policy effected by one *George David Holcombe* on his own life in the Rock Life Assurance Company. The last of these policies had been assigned to the bankrupt, *John Reay*, by *Holcombe*, who on the occasion of the assignment executed a bond to secure the payment of the premiums, and from this circumstance and others it was suggested that the assignment was only by way of mortgage.

On the occasion of the deposit, a memorandum was signed as follows :

“ To Messrs. *Barnett, Hoares & Co.*

Gentlemen,

In consideration of advances, by way of discount or otherwise, which you have made and may hereafter make to or for me, I now deposit in your hands the several policies of insurance enumerated at foot, for the purpose of securing to you or the members of your firm for the time being all sums that may now or hereafter



be due from me in respect of any bills which your firm may have discounted, or may discount for me, and of all advances on any account or accounts between myself and your firm for the time being, with interest after the rate of 5l. per cent. per annum, and I agree that the said policies and all monies thereby secured, or to become due or receivable in respect thereof, shall be a security for and stand charged with the payment to you, or the members of your firm for the time being, of such sums as aforesaid, with interest as aforesaid. And I further agree forthwith, or whenever called upon, to execute to you, or the members of your firm for the time being, in due form of law, a proper assignment of the said policies and monies respectively by way of mortgage, for securing the payment of such sums and interest as aforesaid, such assignment to contain all clauses, covenants and provisions usual in mortgages of a like nature, particularly covenants on my part to pay the premiums on the said policies when due, and to keep the same on foot, and also a power of sale of the said policies and moneys, in default of payment by me of such sums as aforesaid, when called upon by you, or the members of your firm for the time being, so to do, and I hereby agree that it shall be lawful for your firm for the time being, if it should be thought fit, to pay premiums for keeping up the said policies or any of them, and to charge me in account with such premiums, but that it shall not be imperative on your firm to pay any premium whatever for that purpose.

I am, gentlemen, yours obediently,

*London, 26th January, 1843.*

*John Reay."*

Notice of the deposit was on the same day given to the Economic Insurance Office as follows :

1845.

Ex parte  
BARNETT  
and others.

1845.

Ex parte  
BARNETT  
and others.

“ To the Directors and Trustees of the Economic Life Assurance Society.

Gentlemen. We hereby give you notice that *John Reay*, of Mark Lane in the city of London, merchant, has deposited (inter alia) with *George Henry Barnett*, *Samuel Hoare*, *John Gurney Hoare*, *Henry Barnett*, *Joseph Hoare Bradshaw*, and *Joseph Hoare*, a policy of assurance, No. 1644, under the hands and seals of the trustees of the Economic Life Assurance Society, and bearing date the 12th day of August, 1830, effected by the said *John Reay* on the life of *Thomas White*, of the Commercial Sale Rooms in the city of London, merchant, for the sum of 1000*l.*, and also a policy of assurance, No. 3297, under the hands and seals of the trustees of the same court, and bearing date the 10th day of July, 1835, also effected by the said *John Reay* on the life of *George David Holcombe*, then late of Peckham, in the county of Surrey, gentleman, for the sum of 3800*l.* for securing to the said *George Henry Barnett*, *Samuel Hoare*, *John Gurney Hoare*, *Henry Barnett*, *Joseph Hoare Bradshaw*, and *Joseph Hoare*, or the members of their firm for the time being, the payment of all sums now due or hereafter to become due to them from the said *John Reay*.

We are, gentlemen, yours obediently,

(Signed.) *Davies & Sons*,

Solicitors for Messrs. *Barnett*, *Hoares*, *Barnett*,  
*Bradshaw & Co.*”

“ Angel Court, Throgmorton Street,  
26th January, 1843.”

Notice of the deposit was also given to the Rock Insurance Office as regarded the policy on the life of *Holcombe*, but it did not appear that any notice was given to *Holcombe*.

On January 1st, 1844, the bankrupt, *John Reay*, took his son, the other bankrupt, into partnership with him, whereupon a new account was opened with the bankers in the name of the new firm.

1845.  
Ex parte  
BARNETT  
and others.

The deposited documents remained in the custody of the petitioners, who held them upon the understanding that they were to be a security for the balance due to them from time to time from the new firm ; but of this change in the object and purpose of the deposit, no notice was given to the insurance offices.

On the 6th of February, 1845, the new firm deposited with the petitioners other securities for the purpose of further securing the balance due from the new firm. These securities consisted, among other things, of the following particulars :

First. A bond from *Clement Joseph Philip Pen, Baron de Bode*, to one *Adolphus Blumenthal*, for 7000*l.* with interest, payable within a month after satisfaction of certain claims preferred by the said *Baron de Bode* on the British government for compensation in respect of his estates in France, confiscated by the French revolutionary government

Secondly. Five out of seven bills of exchange for 1000*l.* each, severally dated 6th September, 1844, drawn by and payable to the order of the said *Adolphus Blumenthal* twelve months after date, accepted by the said *Baron de Bode*, and indorsed by the said *Adolphus Blumenthal*.

Thirdly. A mortgage of the bond and bills from *Blumenthal* to the bankrupt *John Reay*, dated 12th September, 1844, to secure 7000*l.* and interest.

Fourthly. Ten New Zealand Company's orders in the following form :

1845.

Ex parte  
BARNETT  
and others.

“ New Zealand Land Order.

Two hundred (part 2) and sixty-one.

No. 266.

“ In pursuance of stipulations of the New Zealand Land Company, *John Reay* of London, Esquire, hath one section of land, consisting of one town acre and one hundred country acres, in the company's first and principal settlement, with a right of selection as provided in the regulations of the directors of the company for sales in England of lands in New Zealand. So soon as the said land shall have been selected, you are to deliver to him, his agents or assigns, a certificate under your hand mentioning such land, which is to be accepted as conclusive evidence of the selection, and as an actual delivery of the possession of the land selected. This land order is received by the said *John Reay* as conclusive evidence of title, and as a sufficient conveyance to him, his heirs and assigns, of the land so to be selected, subject to the laws and regulations of the colony and the customs of the country. Nevertheless he and they is and are to be at liberty on or after delivery of the certificate, to require the further assurance from the company or their trustees of such land to him, his heirs and assigns (subject as aforesaid), by such mode of conveyance as shall be adopted in the islands of New Zealand for transferring lands holden by British subjects, such conveyance, so long as the company shall remain unincorporated, to be executed by the trustees or their attorney, and the signature thereto of persons acting as trustees, or of a person acting as the attorney of the trustees, is to be accepted as conclusive evidence of their respective appointments and continuance in office. And in case of such request, you are with all convenient

speed to procure a conveyance to be made to him and them accordingly, he or they bearing all expenses attending the same, but neither the company, nor the directors or other officers or persons signing this order, nor the trustees of other persons executing such conveyance, are to be considered as guaranteeing the title against the results of any proceedings of or under the authority of the British government or legislature, or in other manner, except as against their own acts respectively, and the acts of those deriving title under or in trust for them respectively. This land order is issued in duplicate, and upon the presentation of either copy the other will become void. Dated London, this 1st day of August, 1839.

1845.

Ex parte  
BARNETT  
and others.

*Petre, Alexander Raines, John C. Benlark,*

Three of the directors of the New Zealand

Land Company.

*J. Ward, Secretary.*

"It is understood that her Majesty's government intends to institute an inquiry into the titles of British subjects to lands in New Zealand, but the directors are not aware that the title to the company's lands will be found in any manner impeachable.

"To the resident officer of the New Zealand Land

Company for saleable lands in the islands of

New Zealand and adjacent isles."

"As this land order is issued in duplicate, both copies (marked part 1 and part 2) must be transferred.

"Form to be used when the land order is transferred to another party.

"I of , do hereby assign and transfer to , his heirs and assigns, all my right and interest in and to the within land order, and the section

1845.  
 Ex parte  
 BARNETT  
 and others.

of land, and if requested, a conveyance thereof may be delivered to him or them accordingly. Dated this day of 1839.

Witness, *John Reay*.

*" Form to be used in the appointment of an agent for the selection of land.*

" I appoint , of , my agent, to select for me the section of land referred to in the within land order, and request that the certificate of the selection may be delivered to him on my behalf. Dated this day of , 1839.

Witness ."

The remainder of the deposited documents were title-deeds of freehold and leasehold property.

There was a written memorandum stating the purpose of the deposit, but no notice of it was given either to the *Baron de Bode* or to the New Zealand Company.

Mr. *Swanston* and Mr. *Pryor* in support of the petition. With respect to the change of firm, as the policies were not in the order and disposition of the elder bankrupt of the new firm, they cannot pass to the assignees except subject to the incumbrances upon them, one of which is the debt from the new firm. Next, as to the policy, of which the elder bankrupt is suggested to have been only mortgagee. It is immaterial whether he was so or not, because it has long been decided that notice to a mortgagor is not necessary to complete the transfer of a mortgage debt; *Jones v. Gibbons (a)*. The only other questions are as to the *Baron de Bode's* bond, and the New Zealand shares, but as the bond was given to

secure a debt also secured by bills of exchange, and consequently transferable without notice to the debtor, the doctrine of *Jones v. Gibbons* applies, and renders notice to the obligor unnecessary ; and the New Zealand land shares being real property, are altogether out of the scope of the 72nd section, and the rules respecting notice.

1845.

Ex parte  
BARNETT  
and others.

Mr. *Russell* for the assignees. The policies were in the reputed ownership of the elder bankrupt, subject only to the incumbrance of which notice was given to the insurance offices, that is to say, the debt due from the elder bankrupt alone ; and, independently of the 72nd section, the lien claimed by the petitioners by virtue of the alleged parol or tacit contract or understanding with the new firm, requires, to give it validity, that notice of it should be given to the parties liable to pay the money. As to the policy, of which the elder bankrupt was himself mortgagee, the authority of *Jones v. Gibbons* is not in point, for the decision, and the reasoning upon which it is founded, depend entirely on the circumstance that the subject of the mortgage was real property, to which the law of notice and reputed ownership has no application.

As to the *Baron de Bode's* bond, the fact of a bond debt being collaterally secured by bills of exchange has never been held sufficient to dispense with the necessity of notice being given to the obligor.

The New Zealand land orders give no interest in land ; they designate no land in particular, but are merely directions to allot some property, to be ascertained hereafter. The right which they confer is nothing but a *chose in action*, and cannot be transferred without notice.

1845.

*Lincoln's Inn,  
July 2.*

The right of assignees to inspect or take a copy of a title-deed of the bankrupt's property in the hands of his solicitor, is no higher than the right of the bankrupt himself, and therefore, where the assignees petitioned that the solicitor might produce or give an attested copy of such a document, on being paid only the portion of his costs relating thereto, and the costs of the production or copy, the petition was dismissed with costs.

Ex parte JOSEPH UNDERWOOD, JOSIAH TIBBS and PATRICK JOHNSON. — In the matter of HENRY WILLIAM HEMSWORTH.

THIS was the petition of the assignees, praying that the respondents, Messrs. *Plucknett* and *Roberts*, who had been the bankrupt's solicitors before the bankruptcy, might deposit with the official assignee a bill of sale of a ship, executed to the bankrupt as mortgagee, for inspection, without prejudice to the respondents' lien on the document.

The respondents had prepared the bill of sale by way of mortgage to the bankrupt, and they had acted as his solicitors in a foreclosure suit instituted by him against the mortgagor of the ship. They had also acted generally as his solicitors, and their bill of costs amounted to 900*l*.

The assignees had put up the ship for sale under the fiat, and by the conditions of sale engaged to give the purchaser an attested copy of the bill of sale.

At the sale the ship was knocked down for 1600*l*., and the assignees applied to the respondents to produce the bill of sale, offering to pay the respondents' costs of preparing it and of the foreclosure suit and otherwise relating to the vessel, and of the production of attested copies of the bill of sale; but the respondents declined producing the document, unless the full amount of their bill was paid.

On April 5th, 1845, the petitioners caused the respondents to be served with a summons, requiring them to appear before the Commissioner and to bring the bill of sale, that the same might be inspected, and an attested




copy taken. One of the respondents attended before the Commissioner, and refused to produce the bill of sale, alleging, upon oath, that he and his partner acted as attorneys for the bankrupt from the year 1840 to the time of the bankruptcy; that the bill of sale was placed in his hands immediately after its execution; that there was no agreement in writing between the respondents and the bankrupt relating thereto, and that he refused to produce it or allow a copy to be taken, as the lien of himself and partner would be defeated thereby. The purchaser of the ship had given notice that he should require compensation for the delay in completing the purchase, as he had thereby lost a voyage which he contemplated, and he had also given notice that he should abandon the contract.

The respondents submitted to the jurisdiction of the Court.

Mr. *Russell* and Mr. *Thomas Parker* in support of the petition. The question is whether, if a document of title is in the hands of the bankrupt's solicitor, the solicitor may say to the assignees, "you shall not look at the document without paying me my bill." If there be no bankruptcy the law is, that a solicitor, who discharges himself from being a party's solicitor, cannot exclude his client from the inspection of his papers, but that if the client voluntarily determines the relation a different rule prevails, the Court saying that the client shall not use the papers unless he pays the solicitor. Here neither of these state of things exists; the solicitor has not discharged himself, nor has the client discharged him, but the law has put an end to the relation. They

1845.

Ex parte  
UNDERWOOD  
and others.

1845.  
  
*Ex parte*  
 UNDERWOOD  
 and others.

cited *Ross v. Laughton*(a), and *Brassington v. Brassington*(b). The doctrine of lien cannot be carried further than it is in the case of mortgagee, who can be compelled by the Commissioner to produce his mortgage deed (c).

Mr. *Swanston* and Mr. *Giffard* for the respondents were stopped by the Court.

THE CHIEF JUDGE.—It is possible, that in a case of this description, a solicitor may have conducted himself so as to prejudice his lien by the general law. I assume that here there has been no such conduct. In such a case, independently of the bankruptcy, there would be no question, and the only point is, whether the bankruptcy makes any difference, that is, whether the rights of the assignees are higher than those of the bankrupt.

How the case might have stood if the documents in question had been documents belonging to a cause, or to any proceeding in a court of justice, I do not say; I abstain from giving any opinion on the point. This is simply a title-deed, and with regard to a title-deed, I am of opinion that bankruptcy makes no difference, and that the rights of the assignees are no higher than those of the bankrupt. The solicitor stands substantially in the situation of a solicitor discharged, not by his own act, not by his own choice, or from his own fault. That is the position in which he stands here.

Then there remain two questions, if the first can be called a question; first, whether there has been any evi-

(a) 1 V. & B. 349.

(c) See *Ex parte Caldescott*, Mont. 55.

(b) 1 Si. & Stu. 455.

dence of such conduct on the part of the respondents as would prejudice their right. If it be wished to raise that point, I will allow it to be raised. Next, whether a solicitor having a lien on the client's title deeds can be compelled to give copies of them to the client, without receiving the amount of his bill of costs.

As further argument is not desired, the petition must be dismissed, so far as it prays that the respondents may be ordered to deposit the bill of sale with the official assignee, and all I have to consider is the latter of the two questions which I have mentioned.

If a client is entitled to say to his solicitor, "give me a copy of my title-deed and I will pay for it," and is at the same time at liberty to decline paying the solicitor's bill of costs, the lien of the solicitor may be worth little or nothing.

I think I ought not to make any other order on this petition than to dismiss it with costs, to be paid out of the estate. I attribute no blame to the assignees, and give no opinion whether the respondents might be examined before me, as exercising the same functions as a Commissioner. I consider the submission of the solicitors to extend to the whole merits of the case.

Petition dismissed, with costs out of the estate.

1845.

Ex parte  
UNDERWOOD  
and others.

1845.

*Lincoln's Inn,  
July 7th.*

1. A trader deposits policies of assurance with his bankers to secure the floating balance due from him, and signs a memorandum of the object of the deposit, of which notice is given to the insurance office. Afterwards he takes a partner, and the policies remain, and are treated as a security for the floating balance due from the firm; but of this change in the object of the security, no memorandum is signed, nor is any notice given to the office. On the firm becoming bankrupt, *Held*, that the bankers were entitled to the usual order as in the case of an equitable mortgage without a written memorandum.

2. A mortgagee of a policy of assurance, deposits it by way of submortgage, and gives notice of the submortgage to the insurance office, but not to the original mortgagor: *Held*, that this was sufficient to take the policy out of the reputed ownership of the mortgagee.

3. A bond which is executed to secure the payment of bills of exchange, is mortgaged together with the bills, which are endorsed. Afterwards the mortgagor deposits the bonds and the bills by way of submortgage, and becomes bankrupt, no notice of the submortgage having been given to the obligor. *Held*, that the submortgage was good against the assignees.

4. Deposit, by way of mortgage, of a land order of the New Zealand Company *held* to be good, without notice being given to the company of the deposit.

**Ex parte GEORGE HENRY BARNETT and others.**

—In the matter of JOHN REAY and JOHN ROBERT REAY.

**THIS** was a petition for the usual order in the case of an equitable mortgage.

On January 26, 1843, the bankrupt *John Reay* deposited with the petitioners, who were his bankers, two policies of assurance, effected in the Economic Life Assurance Office, on the lives of two individuals therein named, and also a policy effected by one *George David Holcombe* on his own life in the Rock Life Assurance Company. The last of these policies had been assigned to the bankrupt, *John Reay*, by *Holcombe*, who on the occasion of the assignment executed a bond to secure the payment of the premiums, and from this circumstance and others it was suggested that the assignment was only by way of mortgage.

On the occasion of the deposit, a memorandum was signed as follows :

“ To Messrs. *Barnett, Hoares & Co.*

Gentlemen,

In consideration of advances, by way of discount or otherwise, which you have made and may hereafter make to or for me, I now deposit in your hands the several policies of insurance enumerated at foot, for the purpose of securing to you or the members of your firm for the time being all sums that may now or hereafter

be due from me in respect of any bills which your firm may have discounted, or may discount for me, and of all advances on any account or accounts between myself and your firm for the time being, with interest after the rate of 5l. per cent. per annum, and I agree that the said policies and all monies thereby secured, or to become due or receivable in respect thereof, shall be a security for and stand charged with the payment to you, or the members of your firm for the time being, of such sums as aforesaid, with interest as aforesaid. And I further agree forthwith, or whenever called upon, to execute to you, or the members of your firm for the time being, in due form of law, a proper assignment of the said policies and monies respectively by way of mortgage, for securing the payment of such sums and interest as aforesaid, such assignment to contain all clauses, covenants and provisions usual in mortgages of a like nature, particularly covenants on my part to pay the premiums on the said policies when due, and to keep the same on foot, and also a power of sale of the said policies and moneys, in default of payment by me of such sums as aforesaid, when called upon by you, or the members of your firm for the time being, so to do, and I hereby agree that it shall be lawful for your firm for the time being, if it should be thought fit, to pay premiums for keeping up the said policies or any of them, and to charge me in account with such premiums, but that it shall not be imperative on your firm to pay any premium whatever for that purpose.

I am, gentlemen, yours obediently,

*London, 26th January, 1843.*

*John Reay."*

Notice of the deposit was on the same day given to the Economic Insurance Office as follows :

1845.

Ex parte  
BARNETT  
and others.

1845.

Ex parte  
BARNETT  
and others.

“ To the Directors and Trustees of the Economic Life Assurance Society.

Gentlemen. We hereby give you notice that *John Reay*, of Mark Lane in the city of London, merchant, has deposited (inter alia) with *George Henry Barnett*, *Samuel Hoare*, *John Gurney Hoare*, *Henry Barnett*, *Joseph Hoare Bradshaw*, and *Joseph Hoare*, a policy of assurance, No. 1644, under the hands and seals of the trustees of the Economic Life Assurance Society, and bearing date the 12th day of August, 1830, effected by the said *John Reay* on the life of *Thomas White*, of the Commercial Sale Rooms in the city of London, merchant, for the sum of 1000*l.*, and also a policy of assurance, No. 3297, under the hands and seals of the trustees of the same court, and bearing date the 10th day of July, 1835, also effected by the said *John Reay* on the life of *George David Holcombe*, then late of Peckham, in the county of Surrey, gentleman, for the sum of 3800*l.* for securing to the said *George Henry Barnett*, *Samuel Hoare*, *John Gurney Hoare*, *Henry Barnett*, *Joseph Hoare Bradshaw*, and *Joseph Hoare*, or the members of their firm for the time being, the payment of all sums now due or hereafter to become due to them from the said *John Reay*.

We are, gentlemen, yours obediently,

(Signed.) *Davies & Sons*,

Solicitors for Messrs. *Barnett*, *Hoares*, *Barnett*,  
*Bradshaw & Co.*”

“ Angel Court, Throgmorton Street,  
26th January, 1843.”

Notice of the deposit was also given to the Rock Insurance Office as regarded the policy on the life of *Holcombe*, but it did not appear that any notice was given to *Holcombe*.

On January 1st, 1844, the bankrupt, *John Reay*, took his son, the other bankrupt, into partnership with him, whereupon a new account was opened with the bankers in the name of the new firm.

1845.

Ex parte  
BARNETT  
and others.

The deposited documents remained in the custody of the petitioners, who held them upon the understanding that they were to be a security for the balance due to them from time to time from the new firm; but of this change in the object and purpose of the deposit, no notice was given to the insurance offices.

On the 6th of February, 1845, the new firm deposited with the petitioners other securities for the purpose of further securing the balance due from the new firm. These securities consisted, among other things, of the following particulars :

First. A bond from *Clement Joseph Philip Pen, Baron de Bode*, to one *Adolphus Blumenthal*, for 7000*l.* with interest, payable within a month after satisfaction of certain claims preferred by the said *Baron de Bode* on the British government for compensation in respect of his estates in France, confiscated by the French revolutionary government

Secondly. Five out of seven bills of exchange for 1000*l.* each, severally dated 6th September, 1844, drawn by and payable to the order of the said *Adolphus Blumenthal* twelve months after date, accepted by the said *Baron de Bode*, and indorsed by the said *Adolphus Blumenthal*.

Thirdly. A mortgage of the bond and bills from *Blumenthal* to the bankrupt *John Reay*, dated 12th September, 1844, to secure 7000*l.* and interest.

Fourthly. Ten New Zealand Company's orders in the following form :

1845.

Ex parte  
BARNETT  
and others.

“ New Zealand Land Order.

Two hundred (part 2) and sixty-one.

No. 266.

“ In pursuance of stipulations of the New Zealand Land Company, *John Reay* of London, Esquire, hath one section of land, consisting of one town acre and one hundred country acres, in the company's first and principal settlement, with a right of selection as provided in the regulations of the directors of the company for sales in England of lands in New Zealand. So soon as the said land shall have been selected, you are to deliver to him, his agents or assigns, a certificate under your hand mentioning such land, which is to be accepted as conclusive evidence of the selection, and as an actual delivery of the possession of the land selected. This land order is received by the said *John Reay* as conclusive evidence of title, and as a sufficient conveyance to him, his heirs and assigns, of the land so to be selected, subject to the laws and regulations of the colony and the customs of the country. Nevertheless he and they is and are to be at liberty on or after delivery of the certificate, to require the further assurance from the company or their trustees of such land to him, his heirs and assigns (subject as aforesaid), by such mode of conveyance as shall be adopted in the islands of New Zealand for transferring lands holden by British subjects, such conveyance, so long as the company shall remain unincorporated, to be executed by the trustees or their attorney, and the signature thereto of persons acting as trustees, or of a person acting as the attorney of the trustees, is to be accepted as conclusive evidence of their respective appointments and continuance in office. And in case of such request, you are with all convenient



speed to procure a conveyance to be made to him and them accordingly, he or they bearing all expenses attending the same, but neither the company, nor the directors or other officers or persons signing this order, nor the trustees of other persons executing such conveyance, are to be considered as guaranteeing the title against the results of any proceedings of or under the authority of the British government or legislature, or in other manner, except as against their own acts respectively, and the acts of those deriving title under or in trust for them respectively. This land order is issued in duplicate, and upon the presentation of either copy the other will become void. Dated London, this 1st day of August, 1839.

1845.

Ex parte  
BARNETT  
and others.

*Petre, Alexander Raines, John C. Benlark,*

Three of the directors of the New Zealand

Land Company.

*J. Ward, Secretary.*

"It is understood that her Majesty's government intends to institute an inquiry into the titles of British subjects to lands in New Zealand, but the directors are not aware that the title to the company's lands will be found in any manner impeachable.

"To the resident officer of the New Zealand Land

Company for saleable lands in the islands of

New Zealand and adjacent isles."

"As this land order is issued in duplicate, both copies (marked part 1 and part 2) must be transferred.

"Form to be used when the land order is transferred to another party.

"I            of            , do hereby assign and transfer to            , his heirs and assigns, all my right and interest in and to the within land order, and the section

1845.

Ex parte  
BARNETT  
and others.

of land, and if requested, a conveyance thereof may be delivered to him or them accordingly. Dated this \_\_\_\_\_ day of \_\_\_\_\_ 1839.

Witness, *John Reay*.

*“ Form to be used in the appointment of an agent for the selection of land.*

“ I appoint \_\_\_\_\_, of \_\_\_\_\_, my agent, to select for me the section of land referred to in the within land order, and request that the certificate of the selection may be delivered to him on my behalf. Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1839.

Witness \_\_\_\_\_.”

The remainder of the deposited documents were title-deeds of freehold and leasehold property.

There was a written memorandum stating the purpose of the deposit, but no notice of it was given either to the *Baron de Bode* or to the New Zealand Company.

Mr. *Swanston* and Mr. *Pryor* in support of the petition. With respect to the change of firm, as the policies were not in the order and disposition of the elder bankrupt of the new firm, they cannot pass to the assignees except subject to the incumbrances upon them, one of which is the debt from the new firm. Next, as to the policy, of which the elder bankrupt is suggested to have been only mortgagee. It is immaterial whether he was so or not, because it has long been decided that notice to a mortgagor is not necessary to complete the transfer of a mortgage debt; *Jones v. Gibbons* (a). The only other questions are as to the *Baron de Bode's* bond, and the New Zealand shares, but as the bond was given to

(a) 9 Ves. 407.

secure a debt also secured by bills of exchange, and consequently transferable without notice to the debtor, the doctrine of *Jones v. Gibbons* applies, and renders notice to the obligor unnecessary; and the New Zealand land shares being real property, are altogether out of the scope of the 72nd section, and the rules respecting notice.

1845.

Ex parte  
BARNETT  
and others.

Mr. *Russell* for the assignees. The policies were in the reputed ownership of the elder bankrupt, subject only to the incumbrance of which notice was given to the insurance offices, that is to say, the debt due from the elder bankrupt alone; and, independently of the 72nd section, the lien claimed by the petitioners by virtue of the alleged parol or tacit contract or understanding with the new firm, requires, to give it validity, that notice of it should be given to the parties liable to pay the money. As to the policy, of which the elder bankrupt was himself mortgagee, the authority of *Jones v. Gibbons* is not in point, for the decision, and the reasoning upon which it is founded, depend entirely on the circumstance that the subject of the mortgage was real property, to which the law of notice and reputed ownership has no application.

As to the *Baron de Bode's* bond, the fact of a bond debt being collaterally secured by bills of exchange has never been held sufficient to dispense with the necessity of notice being given to the obligor.

The New Zealand land orders give no interest in land; they designate no land in particular, but are merely directions to allot some property, to be ascertained hereafter. The right which they confer is nothing but a *chose in action*, and cannot be transferred without notice.

1845.

Ex parte  
BARNETT  
and others.

Mr. *Swanston* in reply was stopped by the Court.

The CHIEF JUDGE.—The first question is as to the policies. Mr. *John Reay*, being legally or equitably the owner of policies of assurance, deposits them as a security for a debt due from himself, only, to his bankers, and of that deposit, as well as of its limited object, the insurance office had notice. It had no notice of any transaction subsequent to that. Subsequently, however, the bankers and Mr. *John Reay* varied their agreement in such a way, that the policy ceases to be a security for a debt due from *John Reay* only, and becomes a security for a debt due from *John Reay* and another jointly. I am of opinion, that although of that change the office had not notice, the policy was nevertheless not in the order and disposition of Mr. *John Reay*, that being effectually prevented by the prior notice rendering it impossible to deal with the policy without making enquiries.

The next question is as to the mortgaged policy of which *John Reay* is alleged to have been only a mortgagee. He had the policy assigned to him by Mr. *Holcombe*, and it is said that the assignment was merely as a security for a debt due from Mr. *Holcombe* to him. Holding that policy, he deposited it with his bankers, and the office had notice of that deposit. But it is said to be a case of order and disposition, if it be established that the policy was only a security for a debt from *Holcombe* to *Reay*, because *Holcombe* had no notice of the deposit with the petitioners. I am of opinion, although real estate is not involved in the question, yet that such a circumstance does not prevent the application of the principle laid down in *Jones v. Gibbons*, and that therefore, whether the policy was redeemable or not, the debt

secured by it was not in the bankrupt's order and disposition.

The next question is as to the bond given by the *Baron de Bode* as a security for the payment of certain bills of exchange. It has been decided that bills of exchange do not require notice to be given to the debtor, to take them out of the operation of the section as to order and disposition. Now the bond was given to secure the payment of the bills of exchange for the benefit of the holders, and, in my opinion, notice to the obligor was not necessary under these circumstances (a).

The last point is as to the New Zealand shares. I suppose that they are documents giving a claim to immovable property, and I am at a loss to see any ground on which I can apply the doctrine of order and disposition to them. With regard to the deeds relating to the real estate, if there is any doubt, there must be an enquiry before the Commissioner. On the subject of costs, the purpose of the written memorandum which accompanied the deposit of the policies, must be considered at an end, and the security must be considered as on a parol agreement. The costs must therefore be apportioned.

(a) In *Ex parte Price*, 3 M. D. & D. 586, which was not cited in the principal case, notice was held necessary to give validity to a deposit of a warrant of attorney, which was expressed to be executed to secure payment of two bills of exchange, one of which was deposited as part of the security. In that case, however, the deposited bill was not endorsed, and the deposittee had only an equitable right to have his security completed by the endorsement of the bill.

1845.

Ex parte  
BARNETT  
and others.

1845.



July 16.  
Before the Lord  
Chancellor,

Where the sums of 20*l.* and 10*l.* directed to be paid by 1 & 2 Will. 4, c. 56, ss. 46 and 56, had been paid out of an estate which was insufficient to pay those sums and the petitioning creditor's costs up to the choice, the Lord Chancellor refused to order the payments to be refunded to the petitioning creditors.

Ex parte JOHN CASTELL HOPKINS, RICHARD CUNDELL, and DONATUS O'BRIEN.—In the matter of THOMAS FORSYTH.

THIS was a petition which the petitioning creditors presented to the Lord Chancellor for payment of the costs incurred by the petitioners in suing out the fiat (a), the assets realized having been insufficient for payment both of the costs and of the payments directed to be made by the 1 & 2 Will. 4, c. 56, s. 46 (b), and the question being which of the payments should have priority. The petition stated that 30*l.* was the whole amount of the monies paid into the hands of the official assignee, and that the petitioners were liable for the whole amount of the costs, charges, and expenses of the solicitors employed by them in obtaining and prosecuting the commission, amounting to a considerable sum, no part of those costs up to the choice of assignees having been paid to the petitioners under the act of parliament, although application had been made for the same.

The petitioners submitted, that under the act their costs up to the choice of assignees ought to have been paid by the official assignee before the sums of 20*l.* and 10*l.*; and the prayer was that those costs might be repaid to them out of the sums of 20*l.* and 10*l.* which had been paid into Court.

Mr. *Faber* appeared in support of the petition, but

The LORD CHANCELLOR refused to make any order.

(a) See 6 *Geo.* 4, c. 16, s. 14, *ante*, p. 142, n. (a).

(b) See *ante*, p. 141, n.



1845.

Ex parte WILLIAM REES and ALFRED JOHN ACRAMAN.—In the matter of JAMES SCOWCROFT.

Lincoln's Inn,  
November 1.

THE bankrupt was an attorney and solicitor, and this was the petition of a creditor and the official assignee to have the assignees' accounts opened, and for taxation of the bills of costs of the solicitor to the fiat.

Examinations before the Commissioner cannot be read as evidence on a petition.

The fiat issued on the 18th of January, 1841, and on the 24th of February *William Owens* and *Joseph Marychurch* were chosen assignees.

Where the solicitor to the fiat received and paid all monies on account of the estate, and at the audit the accounts were verified by his affidavit as to their accuracy and the affidavit of the assignees that they had neither received nor paid anything except what had been so received and paid by the solicitor; but there was nothing to show that either of the assignees had either as to information or belief verified the accuracy of the accounts. *Held*, that the accounts ought to be opened and retaken although three years had passed since the audit.

On the 3rd of February, 1842, a dividend of 1s. in the pound was paid, and on the 7th of November, 1842, a further dividend of 1s. in the pound was declared.

The first cash account of the assignees was delivered and audited by three of the Commissioners on the 17th of November, 1841. It was headed,—

“Dr. the estate of Mr. *James Scowcroft*, a bankrupt, in account with the said estate, *per contra*, Cr.” It was signed by the solicitor to the fiat, and extended from the 1st of March, 1841, to the 17th November, 1841. The debit side amounted to 1380*l.* 5*s.* 1*d.* and the payments to 1390*l.* 1*s.* 2*d.*, showing a difference of 50*l.* 3*s.* 11*d.* in hand.

On the occasion of filing the account, the assignee *Marychurch* and the solicitor made an affidavit, whereby the assignee deposed that he had not, and he believed his co-assignee had not, received or paid any sum or sums of money on account of the estate and effects, save what had been paid and received by the solicitor; and the

The retainer by the solicitor under such circumstances of the amount of his bill of costs as taxed by the

Commissioner, and the allowance of such retainer at the audit, *held* no such payment of the bill as to preclude retaxation.

Whether the Commissioner has jurisdiction to open accounts audited and passed by Commissioners under the old jurisdiction, *quære*.

1845.  
Ex parte  
Rass  
and another.

solicitor stated that the account contained a full and true statement of all monies received by him as the solicitor to the assignees, on what account and how the same had been employed, and the several sums therein charged to have been allowed, paid and expended had been allowed, paid and expended for the purposes therein mentioned. Two of the items in the account were the amounts of two bills of costs of the solicitor, which were taxed by three of the Commissioners, one at 50*l.* 17*s.* 7*d.*, being the amount at which the bill had been made out, and the other at 390*l.*, being 17*l.* 3*s.* 6*d.* less than the amount at which the bill was made out.

Another cash account, extending from the 17th November, 1841, up to the 3rd February, 1842, was made out and signed by the solicitor and supported by his affidavit that it contained a full and true statement of all monies received by him as the solicitor to the said assignees, and on what account and how the same had been employed, and that the several sums therein charged to have been allowed, paid and expended had been allowed, paid and expended in manner and for the purposes therein mentioned; and that to his knowledge and belief the said assignees had not received or paid any sum or sums of money whatsoever for or on account of the estate and effects of the said bankrupt under the said fiat save what had been paid and received by him as their solicitor. This account included an item of 31*l.* being the amount of a third bill of costs of the solicitor, which had been taxed at that amount by three of the Commissioners. The account was audited and allowed on the 3rd February, 1842.

On the 7th November, 1842, a third cash account was delivered by the assignees and audited by three of



the Commissioners, supported by an affidavit of the assignees and the solicitor, wherein the assignees stated that they had not received or paid any sum or sums of money whatsoever for or on account of the estate and effects of the bankrupt; and wherein the solicitor stated that the account contained a full statement of all monies received by him as the solicitor to the assignees, and on what account and how the same had been employed, and that the several sums therein charged to have been allowed, paid and expended had been allowed, paid and expended in manner and for the purposes therein mentioned. This third cash account contained on the credit side an item of 51*l.*, being the amount at which a fourth bill of costs, delivered at 52*l.* 19*s.* 6*d.*, had been taxed by the Commissioners.

1845.  
  
*Ex parte*  
*Russ*  
 and another.

On May 6th, 1845, the fiat was transferred to the District Court of Bankruptcy at Bristol, and the petitioner *Acraman* was appointed official assignee. The petitioners obtained a copy of the three cash accounts and the bills of costs, and caused an application to be made to the Commissioner to open the accounts and retax the bills of costs; but the Commissioner declined, on the ground that he had no jurisdiction so to do without the direction of the Court, by reason of the accounts having been audited by the former Commissioners.

*Mr. Russell* and *Mr. Bagshawe*, in support of the petition, proposed to read as evidence an examination taken before the Commissioner.

*Mr. Swanston* and *Mr. Greene*, for the assignees, objected to the examination being read. In *Ex parte*

1845.

Ex parte  
Rees  
and another.

*Chambers* (a), before the Lords Commissioners, your Honor, as counsel for the assignees, tendered as evidence examinations of third persons before the Commissioners, but the counsel for the bankrupt objected to their being read, as the bankrupt had been no party to them, and had had no means of cross-examination; and the Court allowed the objection. Besides, we contend that the examination was not duly taken.

The *Chief Judge*. I assume, without deciding, that the examination was duly taken, and the oath duly administered. Still the question is whether it can be used on the present occasion. The question is not whether notice sufficient in point of time and otherwise has been given of the intention to read the examination; the question is not whether the respondents have had the means of informing themselves of the contents of the examination proposed to be read; the question is not whether they shall be afforded time and opportunity for so informing themselves; but the question is whether if all those facilities were now allowed, the examination could be used. As this is a case in which affidavits would be receivable, perhaps I might, but for that which has been decided, have thought that an examination which had been taken on oath might be considered as equivalent to an affidavit. It is not, however, necessary for me to give an opinion upon the point, for it seems that by admitting the examination as evidence, I should be contradicting what has been decided. Therefore, acting not on my own opinion, but on what I find decided, I think that the examination cannot be read. If,

(a) 2 M. & A. 466, and see the cases there cited.

however, either party examined asks for an opportunity of making an affidavit, I will consider the application.

The petitioners elected to go on with the case without further evidence.

1845.

Ex parte  
Rzes  
and another.

Mr. *Russell* and Mr. *Bagshawe* in support of the petition. The petition has two objects; one to open the accounts and the other to have the solicitor's bills retaxed. As to the former, the Court has no evidence that the accounts were properly supported by the oath of the accounting parties. The affidavits in support of them are clearly insufficient, showing that the assignees delegated their duty to the solicitor, and had no personal knowledge of the matter. The accounts cannot therefore be said to have been passed, but remain still to be taken. As to the solicitor's bills of costs, their retaxation will be probably opposed on the ground that it is precluded by the new act 6 & 7 *Vict.* c. 73, s. 41 (*a*); but the ordinary jurisdiction of this Court is reserved by that act, and here it cannot be said that the bills of costs have been paid, the solicitor having, in fact, merely paid himself by retaining the assets, *Ex parte Woolston* (*b*).

Mr. *Swanston* for the respondents, the creditors' assignees. The course which the Court took in *Ex parte Woolston* (*b*) was not to allow a retaxation of bills

(*a*) 6 & 7 *Vict.* c. 73, s. 41. "That the payment of any such bill shall in no case preclude the Court or judge to whom application shall be made from referring such bill for taxation, if the special circumstances of the case shall in the opinion of such Court or judge appear to require the same, upon such terms and conditions and subject to such directions as to such Court or judge shall seem right, provided the application for such reference be made within twelve calendar months after payment."

(*b*) 3 M. D. & D. 702.

1845.

Ex parte  
Rees  
and another.

which had been taxed as well as paid. The bills are protected by the 6 & 7 *Vict.* c. 73, and moreover the assignees have no funds in hand, and cannot, after the audits and sanction of the Commissioners to their distribution of the funds, be ordered to refund out of their own pockets. They were obliged to act as the Commissioners directed them.

Mr. *Greene* for the solicitor to the fiat. The accounts have been conclusively settled; there is no law or rule that the accounts may be opened after being audited and passed because the assignees have made no affidavit in support of them. It is enough if they satisfy themselves by such means as they consider sufficient of the accuracy of the accounts. The assignees may have been examined *vivâ voce*, and at all events the Court must, at this distance of time, presume that the Commissioners acted properly. The want of an affidavit of the assignees is only an objection to the second account, for the first account is supported by the affidavit of one and the second account by the affidavit of both of the assignees. As to the retaxation of the bills of costs, it is precluded by the 6 & 7 *Vict.* c. 73. That act does not repeal the 6 *Geo.* 4, c. 16, but it limits its operation in point of time. The exception of the 6 *Geo.* 4, c. 16, in the schedule to the 6 & 7 *Vict.* c. 73, shows that the jurisdiction in bankruptcy is within the scope of the latter act.

The CHIEF JUDGE.—With respect to the part of the petition seeking to open the accounts, the Commissioner appears to have thought that as the accounts had been taken by a former Commissioner he had not jurisdiction without an order of this Court to take them into his con-

sideration. That may be a correct view of the matter, but I abstain from giving any opinion upon the point; I consider it, in either view of the case, necessary for me now to make a declaration upon this part of the petition, and I am of opinion that this Court cannot treat the accounts as having been taken. The case of the assignees is that they neither received nor made any payment personally, but that all payments were made by and to the solicitor. It is quite plain that what Mr. *Rees* received and paid was received and paid by him as the agent of the assignees. It is true that Mr. *Rees* states on oath that all his receipts and payments are set forth in the documents laid before the Commissioners and that the assignees neither received nor paid anything, but there is no trace of any evidence to show that either of the assignees positively or as to information or belief verified the accuracy of the accounts. It is suggested that the assignees may have been examined verbally, but this is not stated in any affidavit. Under such circumstances this cannot be considered an account passed in any manner which the Court can regard. I must declare that all the accounts are open, and this I suppose will enable the Commissioners to proceed as if the accounts were now to be taken or audited.

The next question is as to the taxation of the bills of costs. It appears that the solicitor has not been paid in any other sense than that of having received all the assets and having retained the amounts of his bills with the sanction of the Commissioners out of the estate. It appears that this retention took place more than twelve months before this petition was presented and the question therefore must be decided, whether, having regard to the language of the act 6 & 7 Vict. c. 73, and

1845.  
  
 Ex parte  
*Rees*  
 and another.

1845.

*Ex parte*  
*Rass*  
 and another.

having regard also to the circumstance that in the second part of the schedule to that statute the whole of the statute of the 6 *Geo.* 4, c. 16, is mentioned, I can consider that the 41st section applies to such a case as the present. I am of opinion that the 41st section of the act 6 & 7 *Vict.* c. 73, does not apply to this case, and that it is the right of the petitioner to have the bills in this case taxed. I do not say that it would be done after any lapse of time; that was a consideration with which I dealt in *Ex parte Woolston (a)*. The Court might in particular cases think the lapse of time so great as to prevent its acting under the 37th section of the statute. It is possible that cases of such a description may arise. I am of opinion that no such case has arisen here, and as the matter stands, I must order these bills to be taxed.

Ordered accordingly.

(a) 3 M. D. & D. 702.

Ex parte FOLLETT.—In re CUTHBERT and  
 CLARKE.

*Westminster,*  
*November 12.*

When all parties acted under an impression that a security was for the whole amount of a debt and twenty-one years had elapsed since the security was given, but no evidence could be produced of any contract except one for security to a limited amount, which was exceeded by the amount received by the creditor upon his security. *Held*, that the creditor ought not to be called upon to refund.

THE bankruptcy in this case took place in November, 1816, and this was the petition of the official assignee for restitution of a portion of the assets alleged to have been improperly retained by a creditor who had proved under the bankruptcy. The petition stated that in 1812 the bankrupts obtained from their bankers an advance of 2000*l.* upon the security of five promissory notes of 1000*l.* each, which the bankrupts deposited with their

bankers together with a deed dated the 26th of October, 1812, whereby they assigned to the bankers the five promissory notes and also the dividends which should become payable upon them from certain estates liable in respect thereof. The deed contained a covenant for the payment of the 2000*l.* in December, 1812. In February, 1813, the bankers debited the bankrupts with 1500*l.* in part payment of the sum of 2000*l.*, and on the 23rd of September, 1816, they debited them with a further sum of 250*l.* In 1821 the bankers received dividends from the other estates liable upon the bills amounting to 937*l.* In July, 1821, the bankers proved for 233*l.* and received from it two dividends on that sum amounting together to 45*l.* 5*s.* The creditors' assignees were long since dead and also the bankrupts, and a meeting of the creditors had lately been called to appoint a new assignee, but no creditors attended the meeting. All interest in the promissory notes and in the dividends payable on them had become vested in the respondent, and in 1839 the official assignee caused a summons to be served on him requiring him to be examined before the Commissioners respecting this transaction. In reply to this notice the solicitor of the respondent informed the solicitor of the assignee that a general lien was claimed on the promissory notes for the whole amount of the balance due to them from the bankrupts. In May, 1844, the solicitor of the assignee wrote a letter to the respondent requesting an inspection of the bankers' books and also information respecting the claim, but not stating any particular points upon which the assignee was desirous of receiving any information. The respondent in reply stated that the bankers' pass-books, which were in the possession of the assignee, contained

1845.

Ex parte  
FOLLETT.

1845.

  
Ex parte  
FOLLETT.

all the information which could be found in any of the books of the banking house, and he could not at that distance of time remember any of the particulars further than they appeared in those books. In June, 1844, the assignee issued a summons for the respondent to be examined before the Commissioners, but in consequence of illness he was unable to attend or to be examined, and no further summons nor any further information was ever applied for. The prayer of the petition was, that the five promissory notes might be delivered up to the petitioner as official assignee, and that the bankers might be ordered to repay the 627*l.* which they had received beyond the amount of their debt.

From the affidavits on behalf of the respondent it appeared that prior to the bankruptcy four dividends, amounting to 1*l.* in the pound, had been paid from one of the other estates liable on the notes, which the bankers had allowed the bankrupts to receive for their own use, giving them the promissory notes for the purpose of enabling them to receive the dividends and receiving those notes back again from them after the specific dividend had been paid; that the bankrupts were indebted at their bankruptcy to the bankers in a sum of 1108*l.* and that when the 250*l.* was debited in their accounts in September, 1816, nothing was received from them, but the entry was merely made for the convenience of keeping the account, and that under any circumstances 500*l.*, part of the original debt of 2000*l.*, remained due to the bankers. That after the deed of October, 1812, had been executed, the bankers frequently made other advances for the convenience of the bankrupts, and that arrangements were made for securing the bankers from loss arising from them, although no further deed was ever



executed, but all the transactions between the parties proceeded upon the understanding on all sides that the promissory notes and the dividends payable thereon should be security for what was due to the bankers on their account. That in 1821, when the bankers proved their debt, they produced the five promissory notes before the Commissioners, the assignees, the bankrupts and the solicitor, to all of whom the transactions which had taken place were well known, and that the notes were then valued at a sum of 250*l.*, at which price the bankers agreed to purchase them. That the debt of 1108*l.*, due from the bankrupts at their bankruptcy, having been reduced by the receipt of the several dividends to 483*l.*, the 250*l.*, being the purchase money for the five promissory notes, was deducted from that amount of 483*l.*, and the 223*l.* for which the bankers proved consisted of the difference between those two sums.

1845.

Ex parte  
FOLLETT.

Mr. *Swanston* and Mr. *Chandless* in support of the petition, contended that no explanation had been given of the transactions which would enable the Court to assume that the bankers had any lien on these promissory notes or dividends beyond that which they could claim under the deed of assignment; that as the notes were lodged with them for a definite purpose, they could have no general lien on them in the absence of some special agreement for that purpose, *Young v. Bank of Bengal* (a); and that the respondent had rendered it necessary for the assignee to present this petition by his not giving all the information in his power when he had been summoned to be examined.

(a) 1 E. F. Moore, 150; S. C. 1 Deac. 672.

1845.

  
Ex parte  
FOLLETT.

Mr. *James Russell* and Mr. *Twells* for the respondent. As full and satisfactory an account was given of the nature of the transaction as could be expected to be obtained after so great a lapse of time when nearly all the parties were dead. All the proceedings which took place in the lifetime of the parties were perfectly consistent with that account, and the whole course of dealing between the parties show that the deed of assignment could not constitute the whole arrangement which existed between them. The assignee was in possession of all the necessary evidence, and, if he required any further information, he ought to have specified it, and not have merely obtained a summons for the respondent to attend and be examined upon a subject which he must have forgotten, and upon which he could only refresh his recollection by a very minute and painful investigation.

Mr. *Swanston* replied.

The CHIEF JUDGE.—The petitioner is the official assignee under a bankruptcy, the respondent is a creditor who has proved a debt under the bankruptcy. The object of the petition is not to disturb the proof, either by expunging or diminishing it; the object of the petition is not to enforce any contract or alleged contract, on the faith and footing of which the proof was made, but is for the purpose of obtaining from the creditor the restoration of property of the bankrupt which was held by the creditor for a different and unsecured debt as alleged by the petition. Now if it were necessary to decide the question of jurisdiction upon such a petition, I should hesitate long before I came to the

conclusion that this Court had jurisdiction, without the consent of the respondent, upon a petition of such a kind under such circumstances.

1845.

  
Ex parte  
FOLLETT.

But, assuming that the Court has jurisdiction, thus it stands: First, let the case be considered without the respondent's evidence, that is, without his affidavits. The case then is, that the respondent, having a security to a limited amount, received by means of that security more than the sum for which the security gave him a lien, and the petition seeks from him the restoration of the surplus, and the return of the security. But this petition was presented in 1845, and it appears that the last payment received on account of the security by the creditor was received more than one-and-twenty years before the presentation of the petition, and there does not appear to have been within that period any recognition by the respondent that the security was redeemable, or that the estate of the bankrupt, or those who represent it, had any right against the security or the respondent in respect of it. If, in such a state of circumstances, any Court ought to interfere in respect of the security, I am of opinion that this Court ought not to interfere, but ought to leave the petitioner to establish such right (if any) as he can against the respondent by means of a suit, even if this Court (strictly speaking) had jurisdiction to interfere. So it is if the matter be considered independently of the respondent's affidavits.

But bringing his account of the matter into the case, the inference which I draw from the whole is this,—that in 1821 there was an universal supposition on the part of the assignees of the estate then living, and on the respondent's part, however induced, that his security

1845.

Ex parte  
FOLLITT.

was not for a limited amount, but for his whole debt. That could not have been so, unless there had been a contract, distinct from the deed, for that purpose, the deed being, as I have said, only for a limited amount. Now fraud is not suggested. The just inference therefore is, either that there had been such a contract in fact, which, I agree, is not proved; or that it was an honest mistake on all sides on the part of persons who had all equal means of knowledge.

The mistake, if it was one, was made in 1821, and from that period was uniformly and universally acted on. In 1845, after such a lapse of time, when several persons parties to the transaction are dead, the Court is asked to act on the notion that there was no such contract, and also upon the notion that there was a mistake in respect of the existence of a contract against which one party ought to be relieved. I am of opinion that it would be against the principle, on which all laws proceed, of quieting possession, and of not placing parties under the necessity of preserving the records of past transactions, after a great lapse of time, to attend to such a case.

If I were satisfied that it was a mistake to suppose any such contract, (of which I am not clearly satisfied), still, being satisfied that it was an honest mistake on the part of all parties, with equal means of information, made twenty-one years ago, I should decline to interfere upon any such ground. Therefore, though I agree with the learned Commissioner, that this was a matter fit to be investigated, yet, the matter having been investigated, it is impossible, with my view of the case, to make an order on this petition.

What I should have done with regard to the re-

spondent's costs if he had come to be examined under the bankruptcy and answered the letter of May, 1844, I do not say; but as he has not come in to be examined under the bankruptcy, though I do not forget what was stated on the subject of health, and as the letter of May, 1844, was not answered, I dismiss the petition without costs, and also without prejudice to any bill or action, and let the petitioner (the petition having been presented with the sanction of the Commissioner) have his costs out of the estate.

1845.  
Ex parte  
FOLLETT.

Ordered accordingly.

Ex parte HUGH RALPH and CHARLES ROBERT SIMPSON.—In the matter of ARTHUR ACHE-SON DOBBS,

and

Ex parte JOHN KER HASTINGS, ROBERT RUSSELL, HUGH WILLIAMS and JOHN FOLLET.

—In the same matter.

ON May 1st, 1838, the bankrupt contracted with the petitioners, *Ralph* and *Simpson*, to purchase of them an estate and premises at Birkenhead for 3452*l.*, and an agreement was signed by the parties, whereby the petitioners agreed to make and deliver to the bankrupt or his solicitor an abstract of their title as trustees to the premises, with various restrictive conditions as to title, and with the following proviso :

November 19.  
In a contract for a purchase of land there is a stipulation that the conveyance shall be made subject to certain conditions and restrictions as to building upon the land, and to a covenant for their observance, and proper provisions for se-

curing the due performance thereof. *Held*, that this contract entitled the vendor to have a power of entry inserted in the conveyance in case of a breach of the covenant, but not to have a term of years or a rent-charge limited to a trustee. Form of the power of entry which the vendor is entitled to have. Whether such covenants as the above run with the land, *quære*.

1845.

Ex parte  
RALPH  
and another.

Ex parte  
HASTINGS  
and others.

“Provided always and it is hereby agreed and declared that the conveyance to be made of the said premises shall be made subject to the reservations, conditions and restrictions mentioned and contained in the conveyance of the same piece of land from the said *Francis Richard Price* to the said *Thomas Forsyth*, and also subject to a covenant on the part of the said *Arthur Acheson Dobbs*, his heirs and assigns, and proper provisions for securing the due observance and performance thereof; that he the said *Arthur Acheson Dobbs*, his heirs and assigns, shall not nor will at any time or times hereafter erect or build on the said piece of land any other buildings than detached villas, or otherwise that the said *Arthur Acheson Dobbs*, his heirs or assigns, shall build only dwellinghouses to front one or other of the said two streets; that such houses in each street shall be in line with each other, and shall be of an elevation of not less than twenty-five feet from the top of the plinth to the underside of the cornice, and that no court or courts of houses or other buildings shall be built at the back of the said front dwellinghouses respectively, except only stables or other outbuildings attached thereto to front a back street, of not less than six yards wide, and that no cellar or cellars under any of the buildings to be erected on the said piece of land shall at any time be let off or used separately for habitation.”

The conveyance from *Price* to *Forsyth*, mentioned in this agreement, was to the usual uses to bar dower. An abstract was delivered according to the agreement, and the bankrupt entered into possession, but on July 16th, 1839, and before the purchase was completed or any part of the purchase money paid, the fiat issued.

On October 30th, 1843, the vendors served the

assignees with notice to elect whether they would abide by the agreement or abandon it.

No election having been made, the vendors in November, 1843, presented a petition to the Court of Review to have the contract rescinded.

Both parties submitted to the jurisdiction of the Court and to its disposing of all questions relating to the matters of the petition, as if the same were before the Court of Chancery upon a bill to rescind the contract and a cross bill for a specific performance.

Upon the hearing of this petition, it was ordered that the agreement dated the 1st of May, 1838, should be specifically performed and carried into execution, and it was referred to the Commissioner to ascertain and state what was the total amount due to the petitioners, *Ralph* and *Simpson*, according to the terms of the agreement; and upon the petitioners, *Ralph* and *Simpson*, executing, according to the terms of the agreement, a proper conveyance of the estate and premises contained in the agreement, such conveyance to be settled by the Commissioner, if the parties differed about the same, it was ordered that the assignees should pay to them what should remain due on the said accounts.

The Commissioner made his report on the 7th of May, 1844, and soon afterwards the assignees' solicitors prepared the draft of a conveyance of the estate and premises to a purchaser from the assignees. By this draft, an annuitant, named *Mary Anne Watson*, claiming under the will of her husband, one *John Watson*, was made a party to the conveyance, and the only stipulation and provision for enforcing the observance of the conditions as to building were a covenant on the part of the purchaser, his heirs, executors, administrators and as-

1845.

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Ex parte  
RALPH  
and another.

Ex parte  
HASTINGS  
and others.

1845.

Ex parte  
RALPH  
and another.

Ex parte  
HASTINGS  
and others.

signs, that he, his heirs and assigns, would at all times thereafter observe and perform the several covenants and declarations on the part of *Thomas Forsyth*, his appointees, heirs, executors, administrators and assigns, contained in the indenture of the 18th of May, 1832, so far as the same related to or concerned the piece of land thereby assured or intended so to be, and would at all times save harmless and keep indemnified the vendors, their heirs, executors and administrators, or other the real or personal representatives of the testator, from all suits, costs, losses, charges, damages and expenses in respect of the non-performance or non-observance of the covenants and declarations.

On May 13th, 1844, the assignees' solicitors sent the draft to the solicitor of the vendors, who on the following day returned it with a note, stating that he had not approved of the draft, but without making any alteration in it, or raising any specific objection. The Commissioner then settled and approved of the draft. The assignees caused it to be engrossed and stamped, but the vendors refused to complete the purchase.

The assignees then presented a petition, praying that the vendors might be ordered to execute the engrossment.

At the hearing of this petition, it was stated that the annuitant would not execute the deed. The purchaser however agreed to take the conveyance without her concurrence, and it was referred back to the Commissioner to settle the deed of conveyance, having regard to the circumstance that the annuitant would not join, and having regard to the terms of the will of the testator, her husband; and the Commissioner was to be at liberty to report specially any circumstances with regard to the form of such deed of conveyance, which either party might make. In pursuance of this order, the form of the proposed convey-



ance was changed, and the vendors proposed to insert immediately after the habendum a limitation of a rent-charge of 400*l.* per annum to the vendors in fee, issuing out of the premises comprised in the conveyance, with the usual powers of distress and entry, with a proviso that in each and every year in which the covenants entered into by the purchaser should have been performed for the current year, the rent should be held by the vendors, their heirs and assigns, in trust to be attendant on the premises charged therewith, to the intent that the premises might be held and enjoyed, and the rents, issues and profits thereof received and taken by the owner or owners thereof, in such and the same manner in all respects as if the same premises were not subject to or were discharged from the said yearly rent.

This limitation being objected to, it was proposed to be replaced by a limitation of a term of 1000 years to the vendors, their executors, administrators and assigns, upon trust for the purchaser, his heirs and assigns, so long as he and they should perform the covenants as to the mode of building upon and enjoying the property; but if he or they should neglect or fail to observe or perform the covenants, then and so often as the same should happen, upon trust (if the vendors or the survivor of them, his executors, administrators or assigns should so think fit), to enter from time to time into such part of the lands and premises whereon any erection or building contrary to the covenants, or any of them, should be erected, or begun to be erected or made, or whereon any nuisance or prohibited trade, use or employment should be carried on or made, or be begun to be carried on or made, and cause such building to be taken down, and every such nuisance, use or employment, to

1845.

Ex parte  
RALPH  
and another.

Ex parte  
HASTINGS  
and others.

1845.

Ex parte  
RALPH  
and another.

Ex parte  
HASTINGS  
and others.

be removed, abated, or discontinued, all expenses of and incident to which or relating thereto, the purchaser thereby covenanting for himself, his heirs, executors and administrators, forthwith to repay to the vendors, their executors, administrators and assigns, and subject to the trusts aforesaid in trust for the purchaser, his heirs and assigns, and to attend the inheritance.

Mr. *Wigram* and Mr. *Rolt* for the assignees. A covenant is all the vendors are entitled to. The better opinion is that such a covenant will run with the land, at all events if it names the assigns of the covenantors, for it is sufficient that it relates to the land, *Spencer's case* (a). In *Laurence Pakenham's case*, 42 *Edw.* 3, 3, there referred to, a grandfather was seised of the manor of D., whereof a chapel was parcel; a prior, with the consent of his convent, by deed covenanted for him and his successors with the grandfather and his heirs that he and his convent would sing all the week in his chapel parcel of the said manor. The grandfather enfeoffed one of the manor in fee, who gave it the younger son and his wife in tail, and it was adjudged that the tenants in tail as *terretenants* (for the elder brother was heir) should have an action of covenant against the prior, for the covenant was to do a thing which was annexed to the chapel which was within the manor. And in *Hemingway v. Fernandes* (b) the owner of a colliery

(a) 5 Rep. 31 b; see *Bristow v. Wood*, 1 Coll. 480, where a covenant had been entered into by a vendor with a purchaser of a part of the land, his heirs and assigns, that he would only build upon the remainder in a specified way. The Vice-Chancellor Knight Bruce held that the existence of this covenant was a good objection to the title to the remainder. See also *Whitman v. Gibbon*, 9 Sim. 196; *Schreiber v. Creed*, 10 Sim. 9; and 2 Sugd. V & P. 734 et seq. 11th edit.

(b) 13 Sim. 228.

agreed to take a lease of some land to form a railway for the conveyance of his coals, and covenanted with the lessor for himself and his assigns to convey upon the railway all the coal to be gotten from the colliery, and to pay to the lessors 2*d.* for every ton so conveyed; and it was held that this was binding on a party to whom the owner of the colliery assigned his interest in the colliery and under the agreement. *Keppell v. Bailey* (a) may be relied upon by the other side, but it cannot be said to overrule the authorities the other way, and the objection there taken that such covenants as the present are in contravention of the laws against perpetuities, would, if valid, apply to the numerous cases of easements, such as rights of way, of light, running water, and many others to which it is clearly established that property may be subjected without restriction of time. [The *Chief Judge*. There seems some difficulty in understanding the objection to such a modified enjoyment of property on the ground of its supposed tendency to a perpetuity.] At all events the limitation of a term, putting the legal estate out of the purchaser, cannot be agreed to. Why is a purchaser to have such a form of conveyance as would preclude him from recovering at law in an action of ejectment, and as might render the property unsaleable, or considerably lessen its market value, without any express contract to that effect? Besides, any objections to a covenant on the ground of its tending to a perpetuity would apply equally to the creation of a term as now proposed. [The *Chief Judge*. Suppose the proposed trusts to be considered illegal, what would become of the beneficial interest in the term?] That doubt is another objection to such a limitation, for the

1845.

Ex parte  
RALPH  
and another.

Ex parte  
HASTINGS  
and others.

1845.

Ex parte  
RALPH  
and another.

Ex parte  
HASTINGS  
and others.

creation of a term may be valid although the trusts are illegal; and in this case there would be no resulting trust for the purchaser. [The *Chief Judge*. What became of the term in *Tregonwell v. Sydenham* (a)?] The Court of Exchequer there held that the trusts of the term were void, and that the trustee held the term in trust for the parties to whom the estate was devised, subject to the term; but the House of Lords reversed the decision, and held that the heir at law was entitled to the sums directed to be raised under the trusts, which were void for remoteness.

Mr. *Swanston* and Mr. *Follett* for the vendors. By the terms of the agreement the vendors are entitled to something besides a covenant, to some provision which will secure its performance. *Brewster v. Kitchell* (b) and *Keppell v. Bailey* (c) show that a covenant of itself is insufficient for the purpose. The argument that any provision to give effect to the covenant would be subject to the same difficulty as the covenant itself, is answered by adverting to the nature of the objections to the covenant, which are peculiar to that species of contract. A limitation of an estate in the land itself stands upon wholly different grounds. *Spencer's case* (d) was a case of landlord and tenant, so that the covenantee had an interest in the land, and there was privity between the parties, the want of which constitutes the principal difficulty in cases like the present. In the notes to *Spencer's*

(a) 3 Dow, 194.

(b) Lord Raym. 318; 12 Mod. 166; Holt, 175, 669; 5 Mod. 368.

(c) 2 Myl. & K. 534.

(d) 5 Rep. 31 b.

case in *Smith's Leading Cases* (a) all the authorities are collected and this distinction is expressly pointed out, the learned editor summing up all the cases thus, "upon the whole there appears to be no authority for saying that the *burden* of a covenant will run with the land in any case except that of landlord and tenant, which the opinion of Lord *Holt* in *Brewster v. Kitchell* (b), and of Lord *Brougham* in *Keppell v. Bailey* (c), and the reason and convenience of the thing, all militate the other way." *Hemingway v. Fernandes* (d) was also a case of landlord and tenant. In *Laurence Pakenham's case* (e) it was the *benefit* and not the *burden* of the covenant that was held to run with the land. As to the legal estate being outstanding, a Court of Equity would prevent its being set up in an ejectment. [The *Chief Judge*. That would depend on there being time to obtain an injunction. Why is the purchaser to be forced into a Court of Equity?] It is the result of his contract; the covenant is to be enforced, and its defect in not running with the land supplied by some provision, according to the terms of the contract. What then is to be the provision? The practice of conveyancers has been to create a rent-charge and a term to secure it, as was here at first proposed. We are now content to take a term only, and unless the purchaser can suggest some other equally valid provision he cannot object to the proposed mode of carrying the contract into execution. [The *Chief Judge*. Ought the purchaser to be deprived of the legal estate as long as he performs the covenant? Might not a power of entry only be given?]

1845.

Ex parte  
RALPH  
and another.

Ex parte  
HASTINGS  
and others.

(a) Vol. 1, p. 37.

(b) Lord Raym. 318; 12 Mod. 166; Holt, 175, 669; 5 Mod. 368.

(c) 2 Myl. & K. 534.

(d) 13 Sim. 228.

(e) 42 Edw. 3, fo. 2.

1845.

Ex parte  
RALPH  
and another.

Ex parte  
HASTINGS  
and others.

Mr. *Swanston* said he doubted whether that would be a sufficient protection to the vendors.

The *Chief Judge*. Then I am afraid that I can do nothing for you, and you must be satisfied with the covenant.

Mr. *Wigram* in reply.

THE CHIEF JUDGE.—It seems to me that the words “subject to a covenant on the part of the said *Arthur Acheson Dobbs*, his heirs and assigns, and proper provisions for enforcing the performance thereof,” must mean something besides the covenant itself. Their insertion was probably occasioned by the doubt which has been supposed to exist as to covenants of the proposed description running with the land. Nothing occurs to me so near what is right as a power of entry, which might be given in the same terms as those constituting the second clause in every grant of a rent-charge. There would then be a right to bring an ejectment when the contingency arose which it is intended to guard against. If the vendors do not think such a provision as this a sufficient provision for enforcing the performance of the covenant, no other has been suggested to which I think I can accede as proper to be imposed upon the purchaser, according to the terms of the contract.

A clause was afterwards framed and agreed upon in conformity with the suggestion of the Court in the following terms:—Provided always, nevertheless, and it is hereby agreed and declared, that if it shall happen that the said [*purchaser*], his heirs or assigns, shall at any time or times hereafter during the life of any person a party to these presents, or at any

time or times within twenty-one years from the death of the survivor of the several persons parties to these presents, fail to truly observe, perform, fulfil and keep the covenants on his and their parts thirdly and lastly hereinbefore contained, then and in such case, and when and so often as it shall so happen, it shall be lawful for the said [*vendors*], their heirs or assigns, into the said hereditaments and premises hereby assured, or any part thereof in the name of the whole, to enter, with full liberty, power and authority, on each occasion of his or their so entering, to pull down and remove any building erected contrary to the said covenant of the said [*purchaser*] thirdly hereinbefore contained, and do any act which may be requisite specifically to perform the said covenants of the said [*purchaser*] lastly hereinbefore contained: provided also that if the said [*purchaser*], his heirs or assigns, shall not pay and reimburse to the said [*vendors*], their heirs or assigns, all the reasonable costs, charges and expenses, which he or they shall necessarily or properly incur in or about the pulling down or removing any such building as aforesaid, and doing any such other act as aforesaid, and such costs, charges and expenses shall not have been satisfied out of the rents and profits of the said hereditaments and premises, it shall be lawful for the said [*vendors*], their heirs or assigns, to continue in possession of the said hereditaments and premises after they shall have pulled down and removed such building and done such other act as aforesaid, until such time as the said [*purchaser*], his heirs or assigns, shall have paid and reimbursed to the said [*vendors*], their heirs or assigns, such costs, charges and expenses, or until the same shall have been satisfied out of the rents and profits of the same premises. In witness, &c.

1845.

Ex parte  
RALPH  
and another.

Ex parte  
HASTINGS  
and others.

1845.

Ex parte GEORGE GREENSTOCK.—In the matter  
of GEORGE GREENSTOCK.

November 26.

1. An affidavit of debt filed as the foundation of an act of bankruptcy stated the demand to be for goods sold and delivered, but by the particulars of demand the greater portion of the debt was stated merely as due on bills of exchange, which, however, it afterwards turned out were given in respect of goods sold and delivered. *Held*, that the proceeding was irregular and an insufficient foundation for an act of bankruptcy.

2. The debtor on being served with the summons called on the creditor's solicitor and saw his clerk, at whose instance the debtor signed a memorandum, promising to pay at a certain time, or that if he did not, the creditor might proceed on the summons.

The debtor was attended by no solicitor on his behalf, and was

not aware of the irregularity in the proceedings. *Held*, that neither the signature of the memorandum nor his failure to attend the summons prevented his impeaching the regularity of the proceedings, but that the fiat ought to be annulled with costs.

3. *Quere*, whether it can be made part of the order that the creditor should set off his debt against the costs; and whether any consideration of the lien of the debtor's solicitor would prevent such an order being made.

THIS was the petition of the bankrupt to have the fiat annulled.

On the 4th of October the bankrupt was indebted to the petitioning creditors, who on that day served him with particulars of their demand in the following form:—

“Particulars of demand of the undersigned *William Peters and Joseph Peters*, of Redcliff Street in the city of Bristol, tin plate workers and zinc merchants, against you the said *George Greenstock*, amounting to the sum of 132*l.* 15*s.* 2*d.*

| 1845.    |                                                  | £     | s.  | d.   |
|----------|--------------------------------------------------|-------|-----|------|
| Sept. 2. | To bill returned . . .                           | 50    | 0   | 0    |
|          | Interest thereon till now . . .                  | 0     | 4   | 6    |
|          |                                                  | <hr/> |     |      |
|          |                                                  |       | 50  | 4 6  |
| Oct. 3.  | To bill returned . . .                           |       | 72  | 5 0  |
|          |                                                  | <hr/> |     |      |
|          |                                                  |       | 122 | 9 6  |
| Aug. 5.  | To goods . . . . . 25 <i>s.</i>                  | 1     | 15  | 6    |
|          | Basket . . . . .                                 | 0     | 1   | 0    |
| 9.       | To ditto . . . . . 25 <i>s.</i>                  | 4     | 13  | 0    |
|          | Mat 1 <i>s.</i> 6 <i>d.</i> , basket 2 <i>s.</i> | 0     | 3   | 6    |
| 12.      | To ditto . . . . . 20 <i>s.</i>                  | 0     | 13  | 0    |
|          | To ditto . . . . . 25 <i>s.</i>                  | 1     | 13  | 6    |
|          | Basket . . . . .                                 | 0     | 1   | 0    |
| 19.      | To ditto . . . . . 25 <i>s.</i>                  | 2     | 0   | 0    |
|          | Mat . . . . .                                    | 0     | 1   | 0    |
| 20.      | To ditto . . . . . 3 <i>s.</i>                   | 1     | 18  | 3    |
|          |                                                  | <hr/> |     |      |
|          |                                                  |       | 13  | 1 9  |
| CR.      | By 25 <i>s.</i> . . 10 2 0 . . 2 10 6            |       |     |      |
|          | 20 <i>s.</i> . . 0 13 0 . . 0 2 7                |       |     |      |
|          | 3 <i>s.</i> . . 1 Box . . 0 3 0                  |       |     |      |
|          |                                                  | <hr/> |     |      |
|          |                                                  |       | 2   | 16 1 |
|          |                                                  | <hr/> |     |      |
|          |                                                  |       | 10  | 5 8  |
|          |                                                  | <hr/> |     |      |
|          |                                                  |       | 132 | 15 2 |
|          |                                                  | <hr/> |     |      |



"Take notice that we the said *William Peters* and *Joseph Peters* hereby require immediate payment of the sum of 132*l.* 15*s.* 2*d.*

1845.  
~  
Ex parte  
GREENSTOCK.

"Dated this 4th day of October in the year of our Lord, 1845.

*William Peters,*

For self and partner, trading under the style or firm of *William* and *Joseph Peters* at Red-cliff Street in the city of Bristol."

On the 6th of October, 1845, the petitioner went to the office of Messrs. *Peters* and *Abbot*, the attornies for *William Peters* and *Joseph Peters*, in consequence of being served with the above mentioned particulars. He there saw a clerk of Messrs. *Peters* and *Abbot*, who delivered to him a summons from the Court of Bankruptcy for the Bristol District, requiring the petitioner to attend there on the following 13th of October, whereupon the petitioner entered into a conversation with the clerk, and agreed to settle the demand; and the clerk then drew up the following memorandum, which the petitioner signed.

"Bristol.

"Memorandum.

"I the undersigned, *George Greenstock*, do hereby agree to pay to Messrs. *William Peters* and *Joseph Peters* on Saturday, the 11th day of October instant, the sum of 60*l.*, and to pay the further sum of 72*l.* 15*s.* 2*d.* (being the balance of their account against me), together with the sum of 4*l.* 5*s.* law costs that they have sustained, on Saturday the 18th day of October instant, in default of either of which payments they may pro-

1845.  
  
 Ex parte  
 GREENSTOCK.

ceed under the summons in bankruptcy now served upon me. As witness my hand this 6th day of October, 1845.

*Geo. Greenstock.*

Witness, *John Miller.*"

| £     | s. | d. |
|-------|----|----|
| 60    | 0  | 0  |
| 72    | 15 | 2  |
| <hr/> |    |    |
| 132   | 15 | 2  |
| 4     | 5  | 0  |
| <hr/> |    |    |
| 137   | 0  | 2  |
| <hr/> |    |    |

The petitioner by his affidavit stated that he was unacquainted with the nature of legal proceedings, and conceived that by signing this paper (the meaning of which he did not understand, nor had he any attorney on his behalf to explain it,) he had rendered the summons of no importance, and that he need not pay any attention thereto, inasmuch as the demand which had occasioned the issuing thereof had been settled by the agreement.

The petitioner, not being prepared with the 60*l.* agreed to be paid by him on the 11th day of October, called on that day upon Messrs. *Peters* and *Abbot* and explained to one of the members of that firm his inability to pay the 60*l.*, but offered to give a bill of exchange for 75*l.* 10*s.*, accepted by the petitioner's mother-in-law, which the solicitor agreed to receive in discharge of the first instalment, and the petitioner accordingly handed over the bill to him.

The following was the affidavit of debt filed in the Court:—

*" Bristol District Court of Bankruptcy.*

*" William Peters, of the city of Bristol, tin plate worker and zinc merchant, and John Miller of the said city of Bristol, clerk to Messrs. Peters and Abbot*

of the same place, solicitors, severally make oath and say, and first this deponent *William Peters* for himself saith, that *George Greenstock*, of Weston-super-Mare in the county of Somerset, ironmonger, is justly and truly indebted to this deponent and to *Joseph Peters* his copartner in trade in the sum of 132*l.* 15*s.* 2*d.*, for goods sold and delivered by this deponent and *Joseph Peters* his copartner to the said *George Greenstock* between the 1st day of February, 1845, and the 1st day of September, 1845, and at his request. And this deponent further saith, that the said *George Greenstock*, as this deponent verily believes, is a trader within the meaning of the statutes relating to bankrupts, or some or one of them, and resides at Weston-super-Mare in the county of Somerset, and that an account in writing of the particulars of the demand of the said *William Peters* and *Joseph Peters* his partner, amounting to the said sum of 132*l.* 15*s.* 2*d.*, with a notice thereunder written in the form prescribed by the statute in that case made and provided, purporting to require immediate payment of the said debt, is hereunto annexed. And this deponent *John Miller* for himself saith that he did, on the 4th day of October instant, personally serve the said *George Greenstock* with a true copy of the said account and notice.

“ Sworn, 6th October, 1845.

*William Peters.*

*John Miller.”*

The petitioner stated that in consequence of the arrangement with the clerk of Messrs. *Peters* and *Abbot*, and the subsequent delivery of the said acceptance, he took no notice of the summons and did not attend the Court on the 13th of October, and he now submitted that the account and demand so served upon him was

1845.

Ex parte  
GREENSTOCK.

1845.

Ex parte  
GREENSTOCK.

not such an account in writing of the particulars of demand as was directed by 5 & 6 *Vict.* c. 122, s. 11 (a),

(a) The following are the clauses and schedule referred to in the argument and judgment :—

11. " And be it enacted, That if any creditor of any trader, within the meaning of this or any other statute relating to bankrupts now or hereafter to be in force, shall file an affidavit in the Court authorized as hereinafter provided to act in the prosecution of fiats in bankruptcy in the district (to be described as hereinafter mentioned) in which such debtor shall reside, or in the Court of Bankruptcy if such debtor shall not reside in any such district, in the form specified in schedule hereunto annexed (A. No. 1), of the truth of his debt, and of the debtor, as he verily believes, being such trader as aforesaid, and of the delivery to such trader, personally, of an account in writing of the particulars of his demand, with a notice thereunder requiring immediate payment thereof, in the form specified in the said schedule (A. No. 2), it shall be lawful for the Court in which such affidavit shall be filed, as the case may be, to issue a summons in writing, in the form specified in the said schedule (A. No. 3), calling upon such trader to appear before such Court, and stating in such summons the purpose for which such trader is called upon by such summons to appear as hereinafter provided."

13. " And be it enacted, That if any such trader so summoned as aforesaid shall not come before such Court at the time appointed (having no lawful impediment made known to and proved to the satisfaction of the Court at the said time and allowed), or if any such trader, upon his appearance to such summons as aforesaid, or at any enlargement or adjournment thereof, (as the case may be,) shall refuse to admit such demand, and shall not make a deposition, in the form hereinbefore mentioned, that he believes he has a good defence to such demand, then and in either of the said cases, if such trader shall not, within fourteen days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, pay, secure or compound for such demand to the satisfaction of such creditor, or enter into a bond, in such sum and with two sufficient sureties as such Court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought or shall thereafter be brought for the recovering of the same, together with such costs as shall be given in such action, every such trader shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of such summons."

70. " That it shall be lawful for the Commissioner of the Court of Bankruptcy authorized to act in the prosecution of fiats in bankruptcy in London, or the major part of them, and such of the Commissioners to be appointed under this act as shall be nominated by the Lord Chancellor for that purpose, to make from time to time, subject to the sanction and confirmation of the

nor was expressed with reasonable and convenient certainty as to dates and other matters as directed by the 22d Order (a) in Bankruptcy, made on the 12th of No-

1845.  
Ex parte  
GREENSTOCK.

Lord Chancellor, general rules and orders for regulating the forms of proceedings (where not provided for by this act) and the practice to be observed in every Court authorized to act in the prosecution of suits in bankruptcy."

" SCHEDULE (A.)

" No. 1. *Affidavit for summoning a Trader Debtor.*

"A. B. of — and C. D. of — severally make oath and say, and, first, this deponent A. B. for himself saith, that E. F. is justly and truly indebted to this deponent in the sum of — pounds, for, &c. [*stating the nature of the debt with certainty and precision*]; and this deponent further saith, that the said E. F., as this deponent verily believes, is a trader within the meaning of the statutes relating to bankrupts, or some or one of them, and resides at —; and that an account in writing of the particulars of the demand of the said A. B., amounting to the said sum of — pounds, with a notice thereunder written in the form prescribed by the statute in that case made and provided, purporting to require immediate payment of the said debt, is hereunto annexed; and this deponent C. D. for himself saith, that he did, on the — day of — instant [*or 'last'*], personally serve the said E. F. with a true copy of the said account and notice.

" Sworn, &c."

" No. 2. *Particulars of Demand, and Notice requiring Payment.*

" To E. F. of —.

" The following are the particulars of the demand of the undersigned A. B. of — against you the said E. F., amounting to the sum of — pounds [*here copy the account*].

" Take notice, that I the said A. B. hereby require immediate payment of the said sum of — pounds. Dated this — day of —, in the year of our Lord —.

" (Signed) A. B."

(a) The following were the rules referred to:—

22. " The account in such particulars of demand shall be expressed with reasonable and convenient certainty as to dates and all other matters; and where credit is given in such account to the debtor, the notice shall require payment of the difference, or balance only, which appears to be due on such account."

25. " Every affidavit for summoning a debtor under the said act shall state the nature of the debt with the same degree of certainty and precision as is now required in an affidavit to hold to bail by order of a judge in the superior Courts of Westminster."

33. " Any want of compliance on the part of the plaintiff with these

1845.  
 ~~~~~  
 Ex parte  
 GREENSTOCK.

vember, 1842, under the 70th section of the same act, and that under the circumstances aforesaid the said summons was not legal, and that the petitioner was entitled under the 33d Order to be discharged.

That although the affidavit filed by *William Peters*, upon which the summons was grounded, stated that the petitioner was justly and truly indebted to *William Peters* and *Joseph Peters* in 132*l.* 15*s.* 2*d.* for goods sold and delivered and referred to the demand or account in writing as containing the particulars of such demand, yet the demand or account in writing contains no account for goods sold and delivered except to the extent of 10*l.* 5*s.* 8*d.*

That the affidavit did not state the nature of the debt with the same degree of certainty and precision as is now required in an affidavit to hold to bail by order of a judge of the superior Courts at Westminster, and which was required to be done by virtue of the 25th Order. In consequence of the petitioner not attending the said summons he was adjudged to have committed an act of bankruptcy, and on the 23d of October, 1845, the fiat issued, under which he was declared a bankrupt.

On the 27th day of October, 1845, the petitioner was served with a duplicate of the said adjudication, and afterwards disputed the adjudication before the Commis-

rules and orders in the particulars of demand and notice, and in the affidavit for summoning the defendant, and in the summons and service thereof, or in any or either of such matters, may be waived by the defendant, or if made known to and proved to the satisfaction of the Court, at the time required by the summons for the appearance of the defendant, shall be deemed and taken to be a good objection to requiring the defendant to state whether or not he admits the demand sworn to by the plaintiff, or any part thereof; and in such case, if such want of compliance be not waived, the defendant shall be entitled to his discharge from the summons, and a memorandum of such discharge shall be indorsed on the summons."


sioner and stated the abovementioned circumstances. The Commissioner, however, decided that by reason of the petitioner's nonappearance to the summons he was precluded from taking any objection to the account in writing, the demand or the affidavit, and overruled all the petitioner's objections to the adjudication, and called upon the petitioner to submit to be examined under the fiat, which the petitioner did under protest.

On behalf of the respondent affidavits were read to show that the first items in the accounts relating to the bills of exchange really arose in respect of goods sold and delivered.

Mr. *Russell* and Mr. *Bagshawe* in support of the petition. The particulars of demand do not correspond with the affidavit, which swears to a debt for goods sold and delivered, whereas the particulars consist principally of two bills of exchange. The sort of supplemental affidavit now read, to the effect that the debts upon the bills really are for goods sold and delivered, comes too late. Besides, as particulars of a demand for goods sold and delivered, the want of dates and descriptions of goods render them wholly insufficient. Neither the non-attendance in compliance with an irregular summons, nor the signature of a memorandum without legal advice or knowledge of the defendant in the proceedings, can be held a waiver of any objection to the irregularity of the process.

Mr. *Swanston* in support of the fiat. The debtor was bound to attend. By omitting to do so, he lost the opportunity of objecting to the form of the proceeding, and the decision of the Commissioner is conclusive. There

1845.

  
Ex parte  
GREENSTOCK.

1845.

Ex parte  
GREENSTOCK.

is no pretence for saying that the particulars of demand did not give the bankrupt sufficient notice of the nature of the claim.

The CHIEF JUDGE.—The act of bankruptcy in this case has been committed (if at all) under the act 5 & 6 Vict. c. 122, s. 11, [his Honor read the section, see *ante*, p. 234, note *a*.] It is observable that the act does not require that any debt should be proved, or that any account should be delivered, but merely requires an affidavit that these things are so. Nothing, however, turns on that circumstance, except that, if the affidavit should turn out to be inaccurate, it would be competent to the Court to say that the foundation of the proceedings was bad. The act goes on to provide, that if the trader “so summoned” shall not come before the Court at the time appointed, then, under the circumstances mentioned in the statute, an act of bankruptcy is to be deemed to have been committed. But the act of bankruptcy is not committed unless the trader has been summoned in the manner directed by the act. Now the act requires that the creditor should file an affidavit of the truth of his debt, in a form specified in the schedule to the act, to which an account of the particulars of the demand is to be annexed. A copy of the account is to be served on the trader debtor. The demand must be the same as the debt, the truth of which is to be sworn to.

In the first form in the schedule there is this parenthesis, “(stating the nature of the debt with certainty and precision).” The second form is that of the particulars of demand, in which the account is directed to be copied; so that there is no definition in the act of the



sort of account in writing of the particulars of the demand required by it. And if there were no other materials before the Court, it would be the duty of the Court to define what is meant by these words. But the case does not rest there, since the legislature has, by sect. 70, authorized the making of certain rules; and by the 29th of the rules, made in pursuance of the act, it is provided that the account in the particulars of demand shall be expressed with reasonable and convenient certainty as to dates and all other matters. By the 25th rule it is provided, that every affidavit for summoning a debtor under the act shall state the nature of the debt with the same degree of certainty as is now required in an affidavit to hold to bail by order of a judge in the superior Courts of Westminster. Then the 33rd rule provides, that any want of compliance on the part of the plaintiff with the rules and orders in the particulars of demand and notice, and in the affidavit for summoning the defendants, and in the summons and the service thereof, or in any or either of such matters, may be waived, or if made known and proved to the satisfaction of the Court at the time required by the summons for the appearance of the defendant, shall be deemed and taken to be a good objection to requiring the defendant to state whether or not he admits the demand sworn to by the plaintiff, or any part thereof. The rule does not say, if proved at the time of the defendant's appearance, but at the time required for his appearance; seeming, therefore, to include tacitly a provision that the non-appearance of the party is not sufficient to exempt his adversary from proving that every thing has been rightly done. What follows does not, in my opinion, exclude the conclusion derivable from the previous language,

1845.

Ex parte  
GREENSTOCK.

1845.  
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Ex parte  
GREENSTOCK.

which, as I have said, seems to me to require that the propriety of the proceedings should be made apparent to the Commissioner, whether the party summoned do or do not appear. I am therefore of opinion that the mere circumstance of the defendant not appearing is not a waiver of any objection, and did not here exempt his adversary from the duty of showing the correctness of his proceeding, nor render it incumbent on the Commissioner to say that the proceedings were regular. Now here the particulars and the affidavit run thus [his Honor read them]. If the debt was incurred otherwise than for goods sold and delivered, there is no affidavit; for the only affidavit is of a debt for goods sold and delivered. Now in one sense (except as to one item of 4s. 6d.) the items of the account may have been, and I assume were, incurred for goods sold and delivered; but then there is no description of the nature of the goods, nor is there any date or circumstance of ascertainment given to them. The account therefore, as an account of goods sold and delivered, is insufficient. And if there is no sufficient account, there is no affidavit. I am of opinion that the proceedings are irregular and insufficient, and that the course which should have been taken was to bring the document to the Commissioner's attention, and to show him that the terms of the act were not complied with. For if the requisitions of the act are not fulfilled the Commissioner has no jurisdiction; and a man who does not appear upon an illegal process does not thereby waive any objection to it. Next, as to the memorandum which is relied on as a waiver. It is not alleged that the defendant was aware of the nature of the proceedings in which the vice existed. On the question, whether the memorandum is to be considered a waiver, I must look at the place where, and the circumstances under which

it was signed. Looking at them, I decline viewing this memorandum as a waiver. By the affidavit, the petitioning creditor is confined to a debt for goods sold and delivered. The particulars of demand as for goods sold and delivered are materially and substantially insufficient; and there being no waiver, I think that no act of bankruptcy has been committed, and that the fiat must be annulled with costs.

1845.  
Ex parte  
GREENSTOCK.

Mr. *Swanston* asked that the costs might be set off against the debt.

Mr. *Russell*. There is no precedent for such an order. It would interfere with the lien of the defendant's solicitor. If such a rule were laid down, a debtor in such a case might be deprived of the means of obtaining legal assistance. A man is not to be left utterly helpless because he is insolvent.

The CHIEF JUDGE.—In the Court of Chancery the solicitor's lien would not be permitted to interfere with the equities between the parties. I am desirous of allowing the set-off if any precedent for such a course can be found, and particularly for the debtor's own sake. My only difficulty is, that the case must have very often occurred, of a fiat annulled with costs as against the petitioning creditor, though the petitioning creditor's debt is perfectly good; and yet I remember no instance in which the costs have been set off. If Mr. *Ayrton* can find any precedent, let it be done; if not, let the order be in the usual form, without prejudice to any application to have the costs set off.

No such precedent was found, and the order was in the usual form.

1846.



Ex parte CHARLES SHAW.—In the matter of EDWARD ROBBINS and RICHARD BLYTH MUCHALL.

January 23.

Trustees under an assignment for benefit of creditors employ an agent to proceed to America to recover part of the assigned property. Afterwards the debtors become bankrupt, and three of the trustees are appointed assignees. Held, that under the circumstances of the case the assignees ought to be allowed in their accounts the expense of employing the agent.

For the purpose of bringing expenses within the description of just allowances, it is not necessary to show that they have actually benefited the estate, if there was a fair probability of their so doing.

Where there had been no audit of the assignees' accounts and large sums had been received by them, it was held that the official assignee

acted properly in calling for an audit, although twenty-five years had elapsed since any step had been taken and no creditor made any complaint; but the Court being of opinion that the official assignee might with little difficulty and at a small expense have satisfied himself that the circumstances did not render it incumbent upon him to continue to prosecute a claim against the creditors' assignee, he was not held entitled to his full costs as against the latter, there being no estate.

THIS was the petition of the creditors' assignee for the discharge of an order of the Commissioner directing payment of a balance, and of another order of committal for non payment.

In 1820 the bankrupts carried on business as merchants in partnership together, under the firm of *Robbins and Muchall*, at Birmingham and at New York.

*Muchall* resided at Birmingham and managed the business of the partnership there, and *Robbins* resided and managed the business at New York.

Large consignments of goods, which were for the most part bought of manufacturers in Birmingham and its vicinity, were from time to time made by *Muchall* to *Robbins*, to be sold by him in America on account of the partnership. In 1819 the bankrupts had become very largely indebted to various manufacturers and other persons residing principally in Birmingham and its immediate vicinity, and in particular they became so indebted to the firm of *Charles James* and *Charles Shaw*, in which firm the petitioner was a partner. In the same year the bankrupts became embarrassed in their circumstances and were unable to meet their engagements with their creditors, and the bankrupt *Muchall* represented that nearly all the assets of the firm were in America, and that their embarrassments were occa-

sioned by the neglect of *Robbins* to send remittances in return for the consignments made to him by his partner.

At that time *Robbins* had not, so far as was known, committed an act of bankruptcy, and the creditors of the firm were informed that in all probability an English commission of bankrupt would be inoperative in America against *Robbins* and against the property of the firm in that country. The creditors therefore were advised that the best course for them to adopt would be to send out, at the expense and on the behalf of the creditors generally, an agent to America, authorized to proceed against *Robbins* under powers of attorney from some of the principal creditors of the firm for recovery of the amounts of their respective debts, and to apply any amounts which should be recovered under such powers of attorney for the general benefit of all the creditors as in the case of bankruptcy.

Under these circumstances a general meeting of all the creditors of *Robbins* and *Muchall* was summoned for the 11th November, 1819, to be held at Birmingham, and was held there accordingly. All the principal creditors attended the meeting, and agreed to the following resolutions :

“ Resolved,—

“ That Mr. *Muchall* do execute an assignment of the whole of his property for the benefit of his creditors to *John Lilley, James Bushley, junior, Thomas Green Simcox, Charles Shaw, George Calley Lingham, Thomas Atkins, William Baldwin* and *Richard Clarkson*, and that the same be executed by Mr. *Muchall* as soon as Mr. *Robbins* has executed it.

“ That such of the present creditors whom the trustees judge necessary do execute powers of attorney to

1846.



Ex parte  
SHAW.

1846.

  
Ex parte  
SHAW.

such person or persons as the trustees judge necessary to recover their debts, and that the whole of the money recovered be divided amongst all the creditors who accede to the assignment in proportion to their respective debts.

“ That the trustees be authorized to employ such person or persons as they shall judge proper in collecting or assisting in collecting and recovering the property belonging to Messrs. *Robbins* and *Muchall*, and to make such recompense to the person or persons so employed as they shall think proper; and that the expense of all powers of attorney to be sent to America and of the assignment be paid out of the joint estate of *Robbins* and *Muchall*, and that the trustees be also empowered to pay out of the said estate the expense of any action already commenced by any creditor or creditors against Messrs. *Robbins* and *Muchall*.

“ That the creditors present do execute a covenant not to sue Mr. *Muchall* in consideration of such assignment.

“ If Mr. *Baldwin* or Mr. *Clarkson* refuse to act, the assignment to be prepared to the other trustees, and that if they think proper be at liberty to add one or two trustees to their number.”

The petitioner was one of the trustees. Soon after the meeting, the trustees appointed one Mr. *W. Banks* to act as agent, and in that character to proceed to America on behalf of the creditors under powers of attorney. The powers of attorney were all prepared by the solicitors employed by the trustees and in pursuance of their instructions; and the particular creditors who executed the powers incurred no expense, nor did they after the execution of the powers exercise any control over

the person appointed to act in their names, but left the entire management of the business to the trustees.

The trustees on behalf of the creditors agreed with *Bancks* that he should be paid by the creditors his expenses for travelling and maintenance on his voyage to and from America and during his stay there, and also any law or other charges which he might incur; and also after the rate of 200*l.* per annum for his services during the time of his absence; and the bankrupt *Muchall*, out of the assets of the said firm of *Robbins* and *Muchall*, which were to be assigned as aforesaid to the said trustees, paid the said *William Bancks* the sum of 100*l.* on account of what would be due to him from the trustees.

*Bancks* immediately proceeded to America, and from time to time communicated to the trustees what was being done by him; and two general meetings of all the creditors were summoned by the trustees and were numerously attended by the creditors, who were always regularly informed of what was being done from time to time by the trustees.

On the 13th of June, 1820, a joint commission of bankruptcy issued against *Robbins* and *Muchall*, a separate commission having previously issued against *Muchall*, and the petitioner and two other persons were chosen assignees.

The estate and effects of the firm continued in all respects under the same management and control after the issuing of the joint commission as before, and the same solicitors were employed under both the commissions as had been previously employed by the trustees, and the assignees were chosen out of the trustees in

1846.

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Ex parte  
SHAW.

1846.

  
Ex parte  
SHAW.

order that they might adopt and carry on the proceedings commenced on behalf of the creditors by the trustees.

The trustees' solicitors, who were afterwards the solicitors to the commission, and the assignees in their subsequent communications and dealings with *Bancks*, acted under the directions of the creditors, and one of the solicitors to the commission, in pursuance of directions given him by the creditors, and before the choice of assignees, sent to *Bancks* a letter inclosing two copies of the Commissioners' summons, and asking him to endeavour to serve a copy personally on *Robbins*, and to indorse on the other a memorandum of the day of service, so as to be able to prove the service, communicating to him the wish of the creditors that he should discontinue proceedings and return home. On the same day the solicitor wrote and sent a letter to *Robbins* stating it to be the wish of the creditors at large that he should immediately return home and surrender to the commission, and also enable *Bancks*, by letter of attorney or otherwise, to collect what joint property he could bring home with him, and assuring *Robbins* that should he return home and do what he could to assist the assignees in recovering the property the creditors would sign his certificate.

*Bancks* acted on these instructions and returned to this country, but without having realized any assets, having been engaged on behalf of the creditors, through the medium of their trustees before the bankruptcy, and afterwards through the medium of the assignees, from the 26th day of November, 1819, to the 25th of December, 1820. He then required to be paid by the assignees for his employment, but as he had during the



# CASES IN BANKRUPTCY.

247

same period a small commission to execute for some other parties he agreed not to make a charge against the estate of the bankrupts for the whole of the period.

On the 2nd of January, 1821, he rendered the following account to the assignees:

The estate of Messrs. *Robbins* and *Muskill*,

Dr. to *Wm. Banchs*.

Travelling expenses, passage money,

&c., from November 26th, 1819, to

August 23rd, 1820 . . £70

December 1st to 25th . . 25

295 days at 21s. £ 309 15 0

Law expenses in, as per account . . . 17 5 0

Ditto, Kingston, ditto . . . 8 14 8

Money paid at various times to persons em-

ployed in endeavoring to arrest *Mr. Robbins* 12 16 0

Birmingham, January 2nd, 1821.

348 10 8

The petitioner had at this time received some small sums of money on account of the estate, and the account was submitted to the petitioner's co-assignees, and also to a general meeting of the creditors held for that purpose, and it was agreed by them that the sum claimed by *Banchs* was a fit and proper sum to pay him in addition to the 100*l.* he had already received, and the petitioner accordingly paid the demand.

The petitioner deposed to other payments having been made by him on account of the estate far exceeding the amount received by him and the other trustees or assignees, and that the fact that a balance was due to the petitioner was well known to the creditors generally nearly all of whom lived in Birmingham or its imme-

1846.

Es parte  
SHAW.

1846.

  
Ex parte  
SHAW.

diate vicinity, and that it was at the time a matter of notoriety that though the debts and liabilities of the said firm were very large, yet that their assets had been so dealt with and disposed of in America by *Robbins* as to leave no available assets sufficient to pay the expenses of the creditors, and that in consequence thereof the creditors never stirred further in the matter, nor was any audit before the Commissioners ever called for or required by them, because they were satisfied that the same would only uselessly have added to their expenses.

The petitioner also stated that although he was out of pocket in the discharge of his duties as trustee and assignee, yet that partly in consequence of other pressing and more important engagements in business, and partly because some of the creditors were dead and others had become insolvent, he had never required the creditors to repay him the monies he had overpaid on their account.

The affairs of the bankruptcy remained without any further step being taken in them for a period of nearly twenty-five years, but in the month of January, 1845, after the establishment of the Birmingham District Court of Bankruptcy, the proceedings in the bankruptcy were removed into that Court, and an official assignee was appointed.

One of the petitioner's co-assignees was then dead, and the other had never taken an active part in the proceedings as an assignee, nor had ever received or paid anything on account of the estate.

In the early part of the year 1845, the petitioner was required by the official assignee to render an account of his receipts and payments on account of the estate. In the meantime some of the petitioner's books of accounts

had been stolen and destroyed, and the person who stole them had been tried, convicted and punished for the theft; however, on the requisition of the official assignee, the petitioner caused the best account in his power to be made out of his receipts and payments, and handed the same to the official assignee. This account included the abovementioned payment of 348*l.* 10*s.* 8*d.* made to *Bancks*, for which the petitioner took credit and showed a balance of 138*l.* 14*s.* 11*d.* in the petitioner's favor. The Commissioner however disallowed the item of 348*l.* 10*s.* 8*d.*, and upon its allowance depended the question whether anything was due from the petitioner.

1846.

*Ex parte*  
SHAW.

By an order of the 16th of August, 1845, the Commissioner directed the petitioner to pay to the official assignee, Mr. *Bittlestone*, on the 1st day of November then next, the balance appearing due when this and other items were disallowed. On December 28th, 1845, the Commissioner made an order that if the petitioner did not within four days after personal service of such order pay to the official assignee this balance, he should stand committed to prison pursuant to the 7 & 8 *Vict. c. 11, s. 19 (a)*, until he should comply with such

(a) "An Act for facilitating the winding up the affairs of Joint Stock Companies unable to meet their engagements." The following is the section.

Sect. 19. "And it is hereby declared and enacted, that if any person shall disobey any rule or order of the Court authorized to act in the prosecution of any fiat in bankruptcy, duly made by such Court for enforcing any of the purposes and provisions of this act, or of any other act relating to bankruptcy or insolvency, now or hereafter to be in force, or made or entered into by consent of such person for carrying into effect any of such purposes or provisions, it shall and may be lawful for such Court, by warrant under hand and seal, to commit the person so offending to the Queen's prison, or to the common gaol of any county, city, or place where he shall be found or where he shall usually reside, there to remain without bail or mainprize until such person shall have fulfilled the duty required by such rule or order, or until such Court or the Lord Chancellor shall make order to the contrary."

1846.

Ex parte  
SHAW.

order. The prayer of the petition was, that these two orders might be discharged.

It was contended before the Commissioner (Mr. Daniel), that the scope of this clause must, according to the title and preamble of the act, be confined to cases relating to joint stock companies. The following was the judgment of the learned Commissioner on this point:

"I have no hesitation in saying that the present case is one which has given me great anxiety, as it is the first case in which I have been called upon to exercise a new power invested in me by a new act of parliament—the introduction of a new law into an old system. I regret that the clause which gives me this power should have been passed as it has been, for I wish it had been in a separate act. But if that power is given to me, it is quite clear that I cannot shrink from the discharge of that duty because I may not approve of the manner in which that power is given to me, but must exercise that power if called upon to exercise it. The simple question is, whether I possess that power from the act of parliament that has been cited. It has been stated rightly by Mr. Wills, that under former acts of parliament the functions of Commissioners were ministerial, as it was left to the Lord Chancellor or to the Court of Review to enforce the orders made.

"There is one question I cannot allow to be taken into consideration now, namely, an objection to the order previously made by the Court, as the only question is, whether the order can be enforced, and in what manner. Mr. Shaw cannot now complain of any want of opportunity to have made his defence. He had many months last summer given him to enable him to take the case to the Court of Review if he pleased, and he has now the opportunity of going to the Court of Review if he chooses on the order that I have made, and therefore I cannot say that I have not given him every opportunity. Still less right has Mr. Shaw to complain of the length of time that has elapsed since the bankruptcy; for under the old law, the only person who could set the affair in motion and have an audit held was the assignee or his solicitor; for any other person must go to the Lord Chancellor or to the Court of Review. Therefore, as Mr. Shaw was the party who was at all times liable to be attacked for not having the affairs wound up, he should have paid attention to it. For although a formal audit could not have been held until the 6th Geo. 4, there was always power to call the Commissioners together to pass the accounts under a fiat.

"With respect to the clause that has been referred to—if I felt the slightest doubt about the power given to me by this clause, I should be the last person who would act upon it. I feel no desire to act upon any clause which affects the liberty of the subject; but after a careful review of the act, I am of opinion that the clause was inserted for the purpose of giving greater powers to this and other Courts to enforce their orders. It is an act

Mr. *Russell* and Mr. *Rolt* in support of the petition. It is most inexpedient that an official assignee should be permitted, after the lapse of a quarter of a century, and without any complaint being made on the part of any one interested, to raise questions as to the propriety of payments which the deaths of parties and other circumstances must render it almost impossible to discuss with justice to the petitioner. It is not disputed that the petitioner, in discharge of his duty as assignee, has actually paid more than he received, and the only question is as to the propriety of some of the payments. According to the law as it existed at the time when this bankruptcy occurred, it was not the duty of the assignees to have their accounts audited until they were called upon for that purpose. And where the creditors were satisfied, as in this case, that there would be nothing to receive, but something to pay to the assignees, they would not call for an audit.

1846.

Ex parte  
SHAW.

Mr. *Swanston* and Mr. *Bacon* for the official assignee. The assignees have done nothing, which is recorded in the proceedings since the commission issued, although it appears by the balance sheet of the bankrupt *Muchall* that no less a sum than 37,000*l.* must have passed through their hands. There is not a single statement on the proceedings of any thing which they have paid or done.

of parliament for the purpose of winding up the affairs of joint stock companies, but it is evident that this clause applies not only to joint stock companies, but also to all other bankruptcies, and even insolvencies, which are specifically mentioned. I am of opinion that the Court is bound to enforce its own orders under that act of parliament. I can do therefore nothing more than comply with the request that has been made to me, and if the money is not paid within four days from the personal service of this order, I shall issue a warrant under my hand and seal for the committal of Mr. *Shaw*."

1846.

Ex parte  
SHAW.

This proceeding was perfectly necessary, as no one could anticipate that out of 37,000*l.* nothing was realized to the estate. [The *Chief Judge*. There is nothing in this case which induces me to think that it was otherwise than a most proper measure to have the account audited. The official assignee could not anticipate the result. Taking Mr. *Shaw* to be a perfectly respectable and honorable man, the official assignee ought not to regard that circumstance. Mr. *Shaw* says it was no part of his duty to tender his account to the Commissioner, but it was his duty, as it is the duty of every person acting in the capacity of trustee, to be in a condition to have his accounts ready at any time.] The disallowed item was a charge, for which Mr. *Shaw* was, with his co-trustees, personally liable; he had no right to decide in his own favor, without the sanction of the Commissioner, the propriety of charging this amount, a great proportion of which was not due for anything done under the commission, against the estate. And it cannot even be said to have produced any benefit to the estate, for nothing was realized by means of this expense.

Mr. *Russell* in reply.

THE CHIEF JUDGE.—The first question for consideration is this; supposing that, when Mr. *Bancks* sailed, the assignees, or the persons called trustees, had applied to the Lord Chancellor or the Vice-Chancellor sitting in bankruptcy, upon petition praying the allowance of the sum of 348*l.* 10*s.* 8*d.*, whether there is just and reasonable ground for concluding that the sum would have been allowed.

I think that there is. Bankruptcy is a mode of administering the assets of a living person for the benefit of

his creditors under certain circumstances. The creditors are the objects of the proceedings. It is not the only mode of administering the assets of a living person for the benefit of his creditors, and if the creditors for whose benefit the administration in bankruptcy is intended endeavour bonâ fide to carry into effect some other mode of administering the assets which they consider equally for the benefit of the estate, and in a reasonable manner incur expenses for that purpose, there is no ground in law, equity, or reason, why the fund should not be applied to pay those expenses.

It is said that in this case all the creditors did not concur. It does not, however, follow that the expense of fair and reasonable steps, taken by some on behalf of all, is to fall on some only, while all receive the benefit. That is not, I think, the law. I believe that more than one case has occurred in my own experience where expenses have been allowed although no legal claim existed. This view is confirmed by the case *Ex parte Christy (a)*, to which Mr. Ayrton has referred me. The expense must there have been allowed, as I infer, not because it was incurred by the provisional assignee, but because it was incurred for the benefit of the estate. It may be said that in that case an actual benefit was derived by the estate. But the application of the principle does not depend on the result. It depends upon the motive with which the proceeding was taken. The circumstance of the expense being unfruitful does not render it improper to be allowed. But was it unfruitful? If *Bancks* had not gone to America the assignees could not have known what he told them, and if he had not been there it would have been proper for the assignees

1846.

  
Ex parte  
SHAW.

(a) 3 M. &amp; A. 90.

1846.

Ex parte  
SNAW.

to send him or some other person. I am of opinion that the assignees recognized and adopted the agency. He was, it is true, soon recalled. Indeed the recall took place before the choice of assignees. But at whatever date the letters may have been written by the solicitors, the assignees adopted the agency. It is said that all the creditors did not concur in the payment. But I have a strong impression that if the facts were laid before a jury, they, with the direction of the judge, would find that all the creditors did in substance concur, for positive acts are not always necessary to prove concurrence.

The counsel for the official assignee say that the petitioner should not have the benefit of any obscurity, as it was his duty to have brought the matter before the Commissioner. If, however, it had been brought before the Commissioner or the Lord Chancellor in 1820 or 1821, I think that the decision would have been in favor of the petitioner as regards this item of 348*l.* 10*s.* 8*d.*, I therefore allow it, and as it exceeds what the assignee is charged with, nothing will be payable by him. I decide, however, on this ground only, that it is a proper exercise of the jurisdiction of the Court of Review under the special circumstances of the case to allow that sum to the assignee without saying whether it ought to have been allowed by the Commissioner.

The Order will be thus :—

The Court does not consider it necessary to express any opinion upon the two orders in question, or either of them, but declares that in the special and particular circumstances of this case the sum of 348*l.* 10*s.* 8*d.*, in the petition mentioned, ought to be allowed to the petitioner in his account with the estate, and that sum exceeding the sum of 232*l.* mentioned in the two orders, the said last



mentioned sums ought to be considered as satisfied thereby, and this Court therefore stays all proceedings under the two orders.

1846.

Ex parte  
SHAW.

Mr. *Russell* and Mr. *Rolt* asked for costs.

Mr. *Spanston* and Mr. *Bacon* contra.

*Cur. adv. vult.*

On a subsequent day his Honor said upon the subject of costs :—Consistently with the absence of any impeachment of Mr. *Shaw's* integrity, it may, I think, properly be said that he might have proceeded in a more regular as well as a more careful manner than that in which he did proceed in respect of the payments to Mr. *Bancks* and Mr. *Wills*, disallowed by the learned Commissioner. On the other hand, without questioning the propriety of Mr. *Bittleston's* motives in any respect, I am of opinion that with little difficulty, and at a small expense, he might have satisfied himself that the case stood in a position and circumstances such as not to render it incumbent upon him to continue to prosecute the claim. I am of opinion that, ascribing none but good motives to Mr. *Bittleston*, bearing in mind what are the duties of an official assignee, but bearing in mind also the lapse of time, the amount in question, the known facts, and the mode in which the creditors have acted or rather have abstained from acting, I cannot properly make an order upon Mr. *Shaw* to pay the whole or a large sum in respect of Mr. *Bittleston's* costs. There is no estate, and Mr. *Shaw* is in advance. Justice to each party, in the particular circumstances of the case, will, I think, be done as to costs by directing Mr. *Shaw* to pay Mr. *Bittleston* 10*l.* in that respect, and not making any other order as to costs.

1846.

January 28.

A bankrupt's usual place of business for two years before the bankruptcy had been at Hounslow, but he had taken for his family a house at Durdham Down, near Bristol, where he had resided for some months previous to his bankruptcy and contracted debts. A Bristol fiat, describing him as of Durdham Down, and naming him Clarke instead of Clark, was transferred to the London Court, to which a fiat with a correct description had been issued, and the proofs were ordered to be transferred, the Bristol fiat being impounded.

**Ex parte BURBIDGE.—In the matter of JOHN JAMES CLARK.**

**I**N this case two fiats had issued against the bankrupt, his name being misspelt in one of them.

One was dated December 24, 1845, directed to the Bristol District Court of Bankruptcy, and described the bankrupt as John James Clarke, of Durdham Down, builder.

The other was directed to the Court of Bankruptcy, and in this the description was John James Clark, of the Bath Road, Hounslow, and of Twickenham Villas, Twickenham, and also of Durdham Down, Westbury. It appeared that the bankrupt's usual place of business and residence for the last two years was at Hounslow, but that he was employed in building at Twickenham and had taken a house for his family at Durdham Down, near Bristol, where he had himself actually resided from June, 1845, till the November following.

This was the petition of the petitioning creditor under the second fiat to have the first annulled for misdescription. There was an affidavit of one of the creditors stating that the deponent would not have known the bankrupt by the description in the Bristol fiat, and there was also an affidavit that the bankrupt owed considerably more to creditors in or near London than to creditors in or near Bristol.

There had been a choice of assignees under the first fiat.

Mr. *Swanston* and Mr. *Simon* in support of the petition. The Court will not allow the estate to be administered under an incorrect fiat, omitting to describe the bankrupt of the place where he has been chiefly

known as a trader even where his last place of trading is correctly described, *Ex parte Parrey* (a).

1846.

*Ex parte*  
BURBIDGE.

Mr. *Bacon* for the petitioning creditor under the first fiat. In *Ex parte Parrey* the Court proceeded upon the ground of fraud and an intention to mislead.

Mr. *Grady* for the bankrupt submitted to any order the Court might make.

The CHIEF JUDGE.—In general the omission of one letter in a name would be of no importance, but in some names such as *Smith* or *Clark* the exact mode of spelling often forms the distinction. I have known the dignity of a family placed upon the insertion of an *e* between the *m* and *s* in *Williams*. Let the Bristol fiat be transferred to London and be impounded, and let all proceedings under it be stayed, and let the proofs under it be transferred to the London fiat. The Costs of all parties to come out of the estate.

(a) 2 G. & J. 225; and see *Ex parte Beadles*, 2 G. & J. 243.

Ex parte MITCHELL.—In the matter of HARRIS.

Westminster,  
February 4.

THE fiat in this case was sued out by the trader himself under the act 7 & 8 Vict. c. 96, s. 41 (a); and this

*Semble*, a man who has ceased to trade cannot sue out a fiat against himself, unless he owes a debt contracted during the trading,

(a) 7 & 8 Vict. c. 96, s. 41. "And be it enacted, That the Lord Chancellor shall have power, upon petition made to him in writing by any trader who shall have filed a declaration of insolvency in manner and form pre-

which would support a creditor's fiat.

A creditor who has successfully opposed an application by an insolvent for relief under 5 & 6 Vict. c. 116, on the ground that he is a trader, cannot afterwards petition to annul a fiat sued out by the insolvent himself for want of trading.

1846.

Ex parte  
MITCHELL.

was the petition of a creditor to have it annulled on the ground that the bankrupt was not a trader when the fiat issued, nor had been a trader within the last five years previous to the issuing of the fiat. The bankrupt, before suing out the fiat against himself, had applied to the Court of Bankruptcy for relief under the Insolvent Debtors' Act, 5 & 6 Vict. c. 116, s. 1 (a); but the Com-

scribed by the statute in that case made and provided relating to bankrupts, and upon payment of the like sum as is payable upon the granting a fiat upon the petition of a creditor, to be carried to and applicable to the purposes of the account in the Bank of England intituled "The Secretary of Bankrupts' Account," to issue a fiat in bankruptcy against such trader, and to authorise the prosecution thereof in the Court of Bankruptcy in London, or in any District Court of Bankruptcy; and that it shall and may be lawful for such Court so authorised as aforesaid, upon the application of such trader, and upon proof of the trading and of the filing of such declaration, or upon the application of any creditor or creditors of such trader to such amount as by the said statute required for a petitioning creditor's debt, and upon proof of the matters requisite to support a fiat issued upon the petition of a creditor, to make the adjudication of bankruptcy under such fiat, and all further proceedings under such fiat shall be thenceforth prosecuted and carried on in like manner as if such fiat had been issued and adjudicated upon on the petition of a creditor of the bankrupt.

(a) 5 & 6 Vict. c. 116, s. 1. "If any person, not being a trader within the meaning of the statutes now in force relating to bankrupts, or if any person being such trader, but owing debts amounting in the whole to less than three hundred pounds, shall give notice, according to the schedule to this act annexed, to one fourth in number and value of his creditors, and shall cause the same notice to be inserted twice in the London Gazette, and twice in some newspaper circulating within the county wherein he resides, he may present a petition for protection from process to the Court of Bankruptcy, if he has resided twelve calendar months in London or within the London district, or to the Commissioner of bankrupt in the country within whose district he may have resided twelve calendar months, which petition shall have annexed to it a full and true schedule of his debts, with the names of his creditors, and the dates of contracting the debts, severally, the nature of the debt, and the security (if any) given for the same, and also of the nature and amount of his property, and of the debts owing to him, with their dates, and the names of his debtors, and the nature of the securities (if any) which he may have for such debts, and which petition shall also set forth any proposal which he may have to make for the payment, in whole or in part, of his debts; and it shall thereupon be lawful for the Judge or Commissioner of the Court of Bankruptcy to whom, by any order

missioner (Mr. *Holroyd*) held that he was so far a trader that he could not be discharged under that act. It was admitted at the bar on both sides that there was no subsisting debt contracted during the trading of sufficient amount to support a fiat sued out by a creditor.

1846.  
  
 Ex parte  
 MITCHELL.

Mr. *Tripp* in support of the petition. The words of the act are, "the Lord Chancellor shall have power upon petition made to him in writing by *any trader, &c.*," which shows that the petitioner must be a trader "*eo instante*" that the petition is presented.

Mr. *Duncan* for the bankrupt. The argument urged on the other side would apply equally to the former bankrupt law, the words of which are "if any *such trader* shall depart this realm," &c., "every such trader," &c., "shall be deemed to have thereby committed an act bankruptcy." And yet it has been conclusively settled that an act of bankruptcy to support a commission may be committed after the trading has ceased, *Ex parte Bamford (a)*. As to the circumstance of there

of the Court as hereinafter provided, the same shall be referred, or for the Commissioner in the country to whom the petition shall be presented, to give, upon the filing of such petition, a protection to the petitioner from all process whatever, either against his person or his property of every description, which protection shall continue in force and all process be stayed, until the appearance of the petitioner in Court as hereinafter provided; and upon the presentation of any such petition all the estate and effects of the petitioner shall forthwith become vested in the official assignee who shall be nominated by the Commissioner acting in the matter of the said petition; and such official assignee shall and may forthwith take possession of so much thereof as can be reasonably obtained and possessed without suit; and the said official assignee shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under and by virtue of the statute relating to bankrupts."

(a) 15 Ves. 449.

1846.  
~~~~~  
Ex parte  
MITCHELL.

being no debt which would have supported a creditor's fiat, that is a circumstance which cannot affect a fiat not sued out by a creditor. The act enabling traders to sue out fiats themselves contains no requisition whatever as regards the debts, and the Court cannot introduce any limitation or restriction which the legislature has not thought fit to impose. The authorities relating to the validity of a petitioning creditor's debt, its amount, or the time when it must be incurred, can have no application to a case where no petitioning creditor's debt is required to support the fiat, and where there is no petitioning creditor. He also cited *Bailey v. Grant* (a) and *Ex parte Dewdney* (b).

Mr. *Tripp* in reply was stopped by the Court.

The CHIEF JUDGE.—My present impression is that a man who has ceased to be a trader cannot, after he has so ceased, avail himself of the 41st section of the 7 & 8 Vict. c. 96, unless at the time he owes a debt upon which he might be made a bankrupt at the instance of a creditor. It is admitted here that when the declaration of insolvency was filed, the insolvent did not owe any debt by reason of which any creditor could have made him a bankrupt. My present impression therefore is that this fiat ought to be annulled, but as the point is altogether new, I shall be quite ready to hear it re-argued.

On the counsel asking for time to look further into the authorities the case was ordered to stand over.

(a) 9 Bing. 121.

(b) 15 Ves. 479.

The case coming on again on this day,

1846.

Ex parte

MITCHELL.

February 16.

Mr. *Duncan* referred to *Meggot v. Mills* (a) as the first case in which, notwithstanding the words "any such trader," it was held that an act of bankruptcy might be committed after the trading ceased. Another case was *Dawe v. Holdsworth* (b); but it was unnecessary to multiply authorities, as the same party who now sought to annul the fiat on the ground of there being no trading, had prevented the bankrupt from obtaining relief under the 5 & 6 Vict. c. 116, by successfully contending that he was a trader within the meaning of the bankrupt acts, and ought to have such relief under them.

The *Chief Judge*. If this be true, I must hear the petitioner's counsel on the question whether he can be permitted under such circumstances now to deny the trading.

Mr. *Tripp*. The only question on the petition under 5 & 6 Vict. c. 116, was whether the insolvent was entitled to relief under that act of parliament. The present petitioner certainly contended, and the Commissioner decided, that he was not; on the ground that he was a trader within the meaning of the bankrupt laws. But it is nevertheless competent for the petitioner to dispute the respondent's right to sue out this fiat, if it is really a proceeding contrary to law. The only question before the Court is the regularity of the present proceedings. If the Commissioner decided wrongly on the former application, that would be no reason for this Court doing so now.

(a) 1 Ld. Raym. 286.

(b) Peake, 64.

1846.

Ex parte  
MITCHELL.

The CHIEF JUDGE.—I do not decide the question of law. I assume for the present purpose that this fiat is invalid. Agreeing that it is invalid, can I annul it at the instance of the present petitioner on the ground that the respondent is not a trader within the meaning of the bankrupt laws, when the petitioner himself prevented the respondent from obtaining relief under another statute on the sole ground that he was such a trader? I am of opinion that, after the conduct which the petitioner has pursued, he cannot be heard to impeach the fiat on any such ground, and I dismiss the petition with costs.

Before Lord  
Lyndhurst, C.  
Lincoln's Inn,  
February 11.

In the matter of CHARLES HUMBERSTON and  
SAMUEL FRODSHAM.

A vendor of cotton in America, by direction of the purchasers in England, ships the cotton on board a vessel belonging to the latter, who become bankrupt before its arrival. A mortgagee of the ship, who happens to be an agent of the vendor, takes possession of the ship under his mortgage, and sells the cotton under a supposed right on

THIS was an appeal, by way of special case, from the decision of the Court of Review in *Ex parte Molyneux*, reported *ante*, p. 121. The statement of the special case was in substance the same as the statement of the case in the former report.

Mr. *Swanston*, Mr. *Cowling*, and Mr. *Follett*, for the appellants. *Clay v. Harrison* (a) and *Wentworth v. Outhwaite* (b) show that by the stoppage in transitu and resale the contract was rescinded. Whether the

(a) 10 B. & C. 99.

(b) 10 M. & W. 436.

the part of his principal to stop it in transitu, and the principal sanctions the transaction as between himself and the agent by accepting a credit in account for the proceeds of the cotton. The assignees of the purchasers then bring an action against the mortgagee for this seizure, and he pays them, under a compromise, the amount for which the cotton sold.

*Held*, that under the circumstances, the contract was not rescinded by the seizure of the cotton, but that the vendor was entitled to prove for the purchase money.



stoppage was rightful or not, the vendor, by causing the cotton to be resold, put an end to the contract, and cannot prove for the purchase money. If the action of trover had been tried and had failed, there could be no pretence for saying we ever had the value of the goods. It was compromised, but the amount received by virtue of the compromise was hardly more than sufficient to pay the costs of the proceedings. The respondents must show that by the result of the action we are in the same position as we should have been in had the cotton been delivered. They also cited *Boghtlink v. Inglis (a)*.

1846.  
In the matter of  
Humberston  
and another.

Mr. Crompton, Mr. Bacon, and Mr. Rolt for the respondents.

Mr. Swanston in reply.

THE LORD CHANCELLOR.—This appears to me a very plain case. *Blayds Molyneux* was employed to purchase at Charleston a cargo for *Humberston & Co.* *Humberston & Co.* were owners of a ship called the *Diamond*. The ship was their property, the master was their servant. The vessel went to America, and the cotton was shipped on board on account of *Humberston & Co.*

The goods were thus delivered to the purchasers, so that there could not be afterwards any right to stop them *in transitu*. The sum expended in the purchase of the goods and in disbursements was something more than 3000*l.*; from that moment *Blayds Molyneux* had a

1846. right of action to recover this amount against *Humberston & Co.*  
In the matter of  
HUMBERSTON  
and another.

The goods were taken possession of and were sold for 2080*l.* by *Taylor, Molyneux & Co.*, or *Edmund Molyneux*, a partner in that firm, under a supposed right to stop *in transitu*.

In this state of things, it is contended that *Blayds Molyneux*, having seized the goods, cannot recover the price against the estate of *Humberston & Co.*

Now, if there had been no bankruptcy, *Blayds Molyneux* would have had a right to recover this amount, and would have been liable to a cross action for the injurious seizure. An action was brought for the injurious seizure against one of the firm of *Taylor, Molyneux & Co.*, and was carried down three or four times for trial. The parties became tired of litigation, and ultimately it was agreed that, instead of trying the action a fourth time, the defendant should pay the amount of the proceeds of the sale of the cotton to the assignees of *Humberston & Co.*, and the money was accordingly paid over.

Under these circumstances, the parties are in the same situation as if the goods had never been seized; the goods, or the proceeds of the goods, having found their way to the assignees of *Humberston & Co.*

It appears therefore to me that *Blayds Molyneux* was thus remitted to his original right to recover the price of the goods. That right might perhaps have been interrupted in some way, but I think it was not interrupted at law by his agent's intercepting the goods.

It is said he received the proceeds of the goods because he had credit for the amount in his accounts with *Taylor, Molyneux & Co.* They gave him this credit in

the accounts under a misapprehension that they were justified in selling the goods; the moment it turned out that they were not justified in selling the goods, the item would be struck out of the account. There is therefore nothing to prevent the assignees of *Blayds Molyneux* from enforcing their claim against the estate of *Humberston & Co.*, and the appeal must be dismissed with costs.

1846.

*In the matter of  
HUMBERSTON  
and another.*

Ex parte WATTS.—In the matter of SEDGWICK.

**THIS** was the petition of the solicitor to the fiat for leave to purchase a house, part of the bankrupt's estate, situate at Hythe, which was subject to a mortgage for 884*l.* 10*s.*, with an arrear of interest, and the costs of a foreclosure suit, and to a lien for a debt of 40*l.* The fiat issued in May, 1844, and in October the house was put up for sale by public auction, but no offer was made for it. A valuation had been made at 800*l.*, and the petitioner was willing to give 10*l.* for the equity of redemption, and to pay off the incumbrances. The assignees being about again to put up the property for sale, the present petition prayed that the petitioner might be at liberty to become the purchaser.

March 4.

*Under particular circumstances, solicitor to the fiat permitted to purchase part of the bankrupt's estate.*

*Mr. Simpson* supported the petition.

*Mr. Pain* appeared for the assignees, and said they considered it would be for the benefit of the estate to accept the petitioner's offer without the expense of another auction.

1846.

Ex parte  
WATTS.

The CHIEF JUDGE.—As this is the opinion of the assignees I do not see any necessity for a sale by auction.

The Order was as follows :

Mr. *Pain*, of counsel for the creditors' assignees of the estate of the said bankrupt, appearing and stating to the Court that the said assignees are of opinion that it will be beneficial to the estate of the said bankrupt that it should be ordered as prayed as aforesaid, and upon reading the affidavit, &c. (the affidavit of service of the petition upon the official assignee ;)

And the said petitioner by his said counsel undertaking to pay all costs, charges and expenses of all parties of and occasioned by this application, and of the chancery suit in the said petition mentioned, and undertaking to pay to the official assignee of the estate and effects of the said bankrupt the sum of 10*l.* for the purchase money of the bankrupt's interest in the said house and premises, and to pay off all incumbrances affecting the same ; this Court doth order that the said petitioner be at liberty to become the purchaser of the said house and premises for the sum of 10*l.*, and that the assignees of the estate and effects of the said bankrupt be at liberty to convey and assure to him the said house and premises.

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1846.

**Ex parte CONGREVE.**—In the matter of **OLIVER.**

**THIS** was a petition for the appointment of new trustees.

**Mr. Russell** appeared in support of the petition,

**Mr. Swanston** and **Mr. Wigram**, for other parties, submitted that certain grandchildren might, on a certain construction of the instrument creating the trust, be considered interested, and they had not been served.

The **CHIEF JUDGE** said it was never intended that this Court should decide in any case of doubt who were or were not interested as cestuis que trustent, and that in case of doubt all must be served, and the petition stood over accordingly.

*March 16.*  
Upon a petition to appoint new trustees the Court of Review will not decide any question as to who are the cestuis que trustent.

In case of doubt, all who by possibility may be held to fill that character must be parties.

**Ex parte DAVIS.**—In the matter of **DAVIS.**

**THIS** was the bankrupt's petition to have the fiat annulled, with the consent of all the creditors who had proved. The Commissioner declined certifying the consent of the creditors in the usual way until the office fees of 10*l.* and 20*l.*, payable under the 1 & 2 *Will. 4*, c. 56, ss. 46 and 55(a), had been paid. There had been a choice of assignees by the creditors.

(a) See ante, p. 141, n. (a).

were not likely to be any assets. The Court requested the Commissioner to certify his opinion whether there were any available assets.

*Lincoln's Inn,*  
*March 23, 27,*  
*and*  
*April 20.*

On a petition to annul a fiat with consent of creditors, the Commissioner declined to certify the consent without payment of the office fees of 10*l.* and 20*l.*

Assignees had been chosen, but it was stated that there were not and

1846.

Ex parte  
DAVIS.

Mr. *Rolt*, in support of the petition, contended that the Commissioner's certificate might be dispensed with, as was done in *Ex parte Green* (a), *Ex parte Diamond* (b), and *Ex parte Miller* (c). It was true that there had been no choice of assignees in those cases, so that the fees were not payable. But here there were not, and were never likely to be, any means of paying them. That was not a reason for refusing to annul the fiat, if the creditors consented.

The CHIEF JUDGE.—In the cases referred to it was considered unnecessary that there should be a choice of assignees merely for the purpose of entitling the public treasury to the office fees; those for whose benefit the choice would have been made not desiring that there should be any. But here there has been a choice of assignees, and therefore the title of the public has accrued; not merely if any assets have been recovered, but if any are recoverable. I cannot therefore dispose of the case without knowing something more of the condition of the assets. I do not say that if there are no assets I shall refuse to annul the fiat. I should wish to be informed by the Commissioner whether, in his opinion, there are any assets which may be obtained with reasonable diligence.

The Commissioner certified that he was of opinion that the bankrupt had undisclosed property.

April 20.

On this day,

Mr. *Rolt* stated that the office fees would be paid, whereupon,

(a) 1 M. D. & D. 174. (b) *Ante*, p. 143. (c) *Ante*, p. 144.

The COURT ordered that on payment of the fees, and on satisfying the registrar that all the creditors had consented in the manner usual where the Commissioner's certificate is dispensed with, the fiat should be annulled.

1846.



Ex parte  
DAVIS.

Ex parte LAWRENCE.—In the matter of BOWRING.

Lincoln's Inn,  
March 23,  
April 22.

IN this case a commission had been superseded with the consent of the creditors; but it being alleged that the creditors were unaware, at the time, of the bankrupt being entitled to some shares in the West Middlesex Waterworks, a fact which he had never disclosed to them, the present petition was presented by a creditor for a *procedendo*.

A *procedendo* ordered to issue where a commission had been superseded three years previously by consent of the creditors, on the ground that the bankrupt had not disclosed the fact of his being entitled to shares in a waterworks company, his defence being that the shares were subject to a mortgage for more than their value, but which mortgage turned out to be invalid for want of notice to the company.

On behalf of the bankrupt, and also on behalf of a mortgagee of the shares, who was served, affidavits were filed stating that the shares were subject to a mortgage for a greater sum than they were worth, and that therefore it was considered that they did not, in fact, constitute any part of the bankrupt's estate; but from the affidavits in reply, it appeared that no notice of the mortgage had been given to the company.

Shares in such company held subject to the law of reputed ownership, the company's act of parliament declaring them to be personal property.

The commission issued on December 1, 1831.

The last examination took place on February 24, 1832.

In 1843 the writ of *supersedeas* issued under an order made by the consent of the creditors in the usual way.

The petitioner, who had been an assignee under the bankruptcy, stated that he had not before December, 1844, heard of the existence of the shares.

It appeared that the dividends on the shares were paid to the bankrupt till July 31, 1834, and that no

1846.  
Ex parte  
LAWRENCE.

dividends upon them had been received since. By the act relating to the Waterworks Company the shares were declared to be personal estate.

Mr. *Swanston* and Mr. *Hetherington* in support of the petition cited *Ex parte The Lancaster Canal Company*(a).

Mr. *Russell* and Mr. *Beales* for the bankrupt. There was no *mala fides* here. The bankrupt communicated the facts relating to the shares to the official assignee, but, on account of the mortgage, nothing further was done respecting them. Whether the shares were within the law relating to reputed ownership, so as to require notice to be given, was till lately a point undecided, and, in fact, till the case referred to was decided, all the authorities were against such a doctrine. There could be no blame, much less any fraud, in not knowing or acting on it. As there was no misconduct on the part of the bankrupt, there is no ground for reviving a bankruptcy which was superseded by consent. The petitioner and the creditor might have known all the facts if they had inquired. The petitioner admits in his affidavit that he was the bankrupt's solicitor, and was consulted by the bankrupt respecting the shares. All he says on this head is, that it was so long since that he had forgotten the circumstance.

Mr. *W. R. Ellis*, for the mortgagee, admitted that the case could not be distinguished from the case of *The Lancaster Canal Company*.

(a) Mont. & B. 94; 1 D. & C. 411.



Mr. *Steele* for a judgment creditor.

1846.



Ex parte  
LAWRENCE.

Mr. *F. T. White* for the official assignee.

The Court ordered that the proceedings should be revived, the assignees undertaking and submitting to the extent of the estate of the bankrupt to abide by any order which the Court might think fit to make as to any transactions since the *supersedeas*.

The following was the form of the Order :

The petitioner and the said respondent, the official assignee, respectively by their said counsel undertaking and submitting, to the extent of the estate of the bankrupt, to abide by any order of this Court with respect to any transactions since the said *supersedeas*, this Court doth order that the said former order of the 1st day of April, 1845, so confirmed, &c., be discharged, if the Right Honorable the Lord Chancellor shall think fit. And it is ordered, that the said writ of *supersedeas*, dated the 5th day of April, 1845, issued in pursuance of the said order, be recalled, if the Right Honorable the Lord Chancellor shall think fit. And it is ordered, that the said commission of bankrupt issued against the said *Edward Bowring*, and bearing date the 1st day of December, 1831, do stand revived, and that a writ of *procedendo* do forthwith issue for that purpose, if the Right Honorable the Lord Chancellor shall think fit. And it is ordered, that the respective costs of the said petitioner, of the said

1846.

Ex parte  
LAWRENCE.

official assignee, and of the said bankrupt, of and occasioned by this application, and the writ of *procedendo* hereby ordered, to be paid to them respectively in manner hereinafter mentioned out of the estate of the said bankrupt *Edward Bowring*. And it is hereby referred (a), &c. .

(a) This seems to be the first case where a *procedendo* has been issued under an order of the Court of Review. It will be observed that it is a case in which a commission had issued under the law antecedent to the 1 & 2 Will. 4, c. 56, and in which there had been a writ of *supersedeas*. Applications for orders in the nature of a *procedendo* appear to have been made in three cases under the new law. In the first two of these cases the application was refused upon the merits, but objections were in both of them raised to the application on the ground that the Court of Review had no jurisdiction to order the revival of a fiat, annulled by the order of the Lord Chancellor. However, in the earlier of these two cases, *Ex parte Anjer*, 2 Deac. & Chit. 67, the Chief Judge (Mr. Erskine) said, that although the Court of Review had no power to reverse the order of the Lord Chancellor annulling the fiat, it could nevertheless intimate its opinion on the subject to his Lordship, who would then act in accordance with the suggestion of the Court. And in the second of the above cases, *Ex parte Lavender*, 2 Mont. & Ayr. 14, 117; 4 Deac. & Chit. 496, the Court said, that if on the result a *procedendo* was warrantable, there would be found no difficulty in directing it, or something analogous to it. The only instance in which such an order has been made, so far as the reporter is aware, is in the remaining case of the above mentioned three, viz. *Ex parte Young*, 1 Mont. Deac. & De G. 117, where the order was in the following form:—

“ In Bankruptcy, Court of Review.

“ Tuesday, March 17, 1840.

“ In the matter of *Richard Dalby*, bankrupt.

“ Whereas *William Young*, of &c., on &c., presented unto this Court his petition in the above matter, praying that this Court would be pleased to rehear the petition of the said *Richard Dalby*, and upon such rehearing to receive additional evidence in support of the said petitioner's said debt, and after such rehearing to intimate to the Lord Chancellor that in the opinion of this Court it was right that his Lordship's order for annulling the said fiat should be rescinded by his Lordship, and a writ of *procedendo* should issue commanding the said Commissioner to proceed upon the said fiat as if the same had not been annulled,” &c. “ This Court doth order, on the said petitioner *William Young* paying to the said *Richard Dalby* the respondent, or to Mr. *George Vincent* his solicitor or agent, the costs of the said *William Dalby* of and occasioned by this application, such costs to be taxed by

*Francis Gregg, Esq., an officer, &c.,* if the parties differ about the same, that the fiat awarded and issued against the said *Richard Dalby*, and bearing date the 30th day of September, 1839, in the said former order mentioned, and the proceedings had and taken under the said fiat, do severally stand revived if the Lord Chancellor shall think fit, and this order is made without prejudice to any petition, action or other rights of the said bankrupt."

1846.

Ex parte  
LAWRENCE.

In the matter of JOHN MARSHALL, a Bankrupt,  
and

In the matter of WILLIAM MARSHALL and  
HENRY RODGERS, Bankrupts.

Before Lord  
Lyndhurst.  
April 16 and  
November 3 (a).

THIS was an appeal from the decision of the Court of Review, reported 3 Mont., Dea. & De G. 671, on the following

SPECIAL CASE.

In and previous to the year 1839, the bankrupts, *William Marshall* and *Henry Rodgers*, carried on business in copartnership, as iron founders, with *Edwin Maw*, at Liverpool, under the firm of *Maw, Rodgers and Marshall*; and in the month of December, 1839, *E. Maw* withdrew from the concern, and assigned his share in the stock in trade and effects of the partnership, and also in the leases of the iron foundry and works, to his

By a composition deed between A. and B. and scheduled creditors of A., after reciting that it had been agreed that A. should pay the creditors 10s. in the pound; and after reciting that B. had agreed to join in the deed for the purpose of better securing payment of the composition, on having such assignment made to him as was therein after contained; it was witnessed,  
1. That A. and

(a) The judgment was delivered by Lord Lyndhurst after his Lordship had resigned the great seal.

B. covenanted to pay the creditors the composition; 2. That in consideration of this covenant A. assigned all his stock in trade, machinery and effects to B., to hold as B.'s own goods and chattels; 3. That the creditors covenanted on receiving the composition to release A.

Contemporaneously with this deed the leasehold trade premises were assigned by A. to B. with the privity of the creditors.

At the time of the execution of the deed all the assigned property was in the possession of certain mortgagees of the leasehold premises and machinery, who afterwards gave up possession to B. on his guaranteeing payment of the mortgage money. Immediately after the execution of the deed B. gave the creditors his promissory notes for the amount of the composition. B. remained in possession till he became bankrupt, and after his bankruptcy a fiat was sued out against A. by a creditor who knew of the deed though he had not executed it. He was a friend of A., and indifferent to the payment of his debt, but permitted his name to be used by the creditors who had signed the deed for the purpose of suing out the fiat. Held, 1. That the composition deed was an act of bankruptcy, and not a sale for value; 2. That the assigned property was not in the reputed ownership of B.; 3. That the circumstances under which the fiat was sued out against A. did not prevent A.'s assignees from recovering the property.

1846.

In the matter of  
 J. MARSHALL.  
 In the matter of  
 W. MARSHALL  
 and another.

copartners, *W. Marshall* and *H. Rodgers*, who thenceforth carried on the same business in copartnership, under the firm of *Marshall, Rodgers & Co.*, until the date and execution of the deed of composition and assignment hereinafter mentioned. The firm of *Marshall, Rodgers & Co.* was possessed of and entitled for a term of years to certain parcels of land in Wood Street North, Waterloo Road, and Formley Street, Liverpool, where their foundry and works were carried on; and they were also possessed of the steam engines, boilers, machinery and fixtures belonging to the said foundry and works, but subject to a mortgage of the foundry, engines, boilers, machinery and fixtures, dated the 29th day of February, 1840, to the Royal Bank of Liverpool, for securing to the bank the payment of the general balance of accounts between the said bankrupts, *W. Marshall* and *H. Rodgers*, and the bank, as bankers and customer.

The firm of *Marshall, Rodgers & Co.*, down to the time of the composition and assignment hereinafter mentioned, also possessed large and valuable stock in trade, consisting of goods, wares and merchandizes of various descriptions, and the same was kept and dealt with and employed by them upon their said foundry and works for the purpose of their said business. In the month of October, 1840, the firm of *Marshall, Rodgers & Co.* were in pecuniary difficulties, and the sheriff of Lancashire seized and entered into possession of the said foundry and works, and the said engines and boilers, machinery and fixtures, stock in trade and effects therein, under a legal process to him directed for the purpose. The said Royal Bank of Liverpool, on being informed of such seizure, caused a written notice to be delivered to the officer in possession, claiming the engines, boilers, ma-

chinery and fixtures, as well as the leasehold estate of the said firm of *Marshall, Rodgers & Co.* in the foundry and works, by virtue of their mortgage. And a person authorized for that purpose by the bank, in the said month of October, 1840, entered upon the said foundry and works, and took possession of the said engines, boilers, machinery and fixtures on behalf of the bank, and continued in such possession. The sheriff of Lancashire afterwards withdrew from the possession of the said foundry and works, and the stock and effects therein. In and for some time subsequent to the month of October, 1840, *W. Marshall* the elder, since deceased, and the bankrupt *J. Marshall*, carried on business in partnership in the county of Stafford. Shortly after the time at which possession was taken of the foundry and the effects therein by the sheriff and by the Royal Bank of Liverpool, a meeting of the creditors of *Marshall, Rodgers & Co.* was convened, at which it was stated, as the fact was, that the firm was insolvent, and ultimately an arrangement was come to between the firm and their creditors (except the Royal Bank of Liverpool) for compromising and settling the claims of the said creditors upon the terms mentioned in the deed of composition and assignment next hereinafter stated.

A copy of this deed was added by way of appendix, and was to be taken as part of the special case. The following abstract of the document will be found sufficient for the purpose of this report. The deed was dated December 1, 1840, and was made between *W. Marshall* the younger and *H. Rodgers* of the first part; *W. Marshall* the elder and *J. Marshall* of the second part; and certain scheduled creditors who had executed the deed of the third part. The recitals were

1846.

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In the matter of  
*J. MARSHALL.*  
In the matter of  
*W. MARSHALL*  
and another.

1846.

In the matter of  
J. MARSHALL.  
In the matter of  
W. MARSHALL  
and another.

as follow : “ Whereas the said *W. Marshall* the younger and *H. Rodgers*, as such copartners as aforesaid, are indebted to the several persons parties hereto of the third part, or to them and their respective partner or partners, in the several sums set opposite to their respective names, and being unable to pay the same in full, it hath been proposed by them, and agreed to by the said parties hereto of the third part, that he the said *W. Marshall* the younger and *H. Rodgers* should, in full satisfaction and discharge of the said several debts so respectively due to the said several parties hereto of the third part, pay to them the said several parties hereto of the third part respectively a composition of 10s. in the pound on the amount of such debts, by instalments of 7s. 6d. in the pound thereon on the 1st day of July next, and a further and final instalment of 2s. 6d. in the pound thereon on the 1st day of October next ; and that the said several parties hereto of the third part should thereupon give and execute to the said *W. Marshall* the younger and *H. Rodgers* an effectual release and discharge from the said several debts : And whereas the said *W. Marshall* the elder and *J. Marshall* have agreed to execute the covenant hereinafter contained for the purpose of better securing the due and punctual payment of the said instalments, on having such assignment of the partnership estates, property and effects of the said *W. Marshall* the younger and *H. Rodgers* as is hereinafter mentioned and contained executed to them : And whereas by an indenture of assignment bearing even date with, and intended to be executed immediately before these presents, and made or expressed to be made between the said *W. Marshall* the younger and *H. Rodgers* of the one part, and the said *W. Marshall* the

elder and *J. Marshall* of the other part, all and singular the leasehold estates and premises of the said *W. Marshall* the younger and *H. Rodgers* have been, or are intended to be, with the privity, consent and approbation of the said several parties hereto of the third part, testified by their respectively executing these presents either by themselves or their respective partner or partners, or other person or persons duly authorized in that behalf, assigned and conveyed by the said *W. Marshall* the younger and *H. Rodgers* to the said *W. Marshall* the elder and *J. Marshall*, their executors, administrators and assigns, for all the several residues now to come and unexpired of the several terms therein, subject to the payment of the rent and performance of the covenants in the several leases thereof reserved and contained: Now therefore this indenture witnesseth," &c. Then followed the first witnessing part, which consisted of a joint and several covenant by *W. Marshall* the younger and *H. Rodgers*, *W. Marshall* the elder and *J. Marshall* to pay to the parties of the third part 10s. in the pound on their respective debts by two instalments, one of 7s. 6d., to be paid on July 1, 1841, and the remaining 2s. 6d. on October 1, 1841. By the next witnessing part, (in consideration of the covenant thereinbefore contained on the part of *W. Marshall* the elder and *J. Marshall*), *W. Marshall* the younger and *Rodgers*, with the consent of the parties thereto of the third part, assigned to *W. Marshall* the elder and *J. Marshall*, their executors, &c. "all and singular the goods, wares and merchandize, stock in trade, fixtures, machinery, book and other debts, bonds, bills, notes and other securities for money, and all other the goods, chattels and personal estate and effects of and belonging or

1846.

In the matter of  
J. MARSHALL.  
In the matter of  
W. MARSHALL  
and another.

1846.  
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 In the matter of  
 J. MARSHALL.  
 In the matter of  
 W. MARSHALL  
 and another.

due and owing to the said *W. Marshall* the younger and *H. Rodgers*, or either of them, as such copartners in trade as aforesaid, and all the right, title, interest, property, profit, possession, claim, and demand whatsoever, both at law and in equity, of them the said *W. Marshall* the younger and *H. Rodgers*, and each of them, into and upon the goods, chattels, debts, monies and other the premises" thereby assigned or intended so to be and every of them and every part thereof, To have and to hold the said goods, chattels, debts, monies and premises thereby assigned or intended so to be unto the said *W. Marshall* the elder and *J. Marshall*, their executors, administrators and assigns as their own proper goods, chattels and effects. Immediately after these words followed a power of attorney in the usual form, and then came the last witnessing part, whereby the parties of the third part covenanted that they would within a calendar month after October 1, 1841, in case the composition of 10s. in the pound should be paid according to the covenant, release *W. Marshall* the younger and *H. Rodgers* from all claims in respect of the scheduled debts, and in the meantime, or until some breach of the covenant for payment of the instalments, that they would not sue *W. Marshall* the younger and *H. Rodgers* or either of them for the scheduled debts.

The deed was executed by forty-two persons, who were then supposed to be all the creditors of *Marshall, Rodgers & Co.* except the Royal Bank, who did not execute the deed, having securities which it was believed would cover their account; the Royal Bank was also at that time in possession of the said foundry and works and of the said engines, boilers, machinery and fixtures.

At the time of the execution of the deed of composition



and assignment, the only property of the said *W. Marshall* the younger, besides his interest in the partnership concern and property of *Marshall, Rodgers & Co.*, consisted of one third share and interest in a colliery called Herbert's Park Colliery, in Darlaston, in the county of Stafford, which share and interest had been assigned by way of equitable mortgage to *John Vaughan Barber* and *W. Marshall* the elder, bankers, to secure a separate bankruptcy debt of him the said *W. Marshall* the younger, and the said share and interest had been sold, under an order of the Court of Review made on the petition of the assignees of the said Messrs. *Barber* and *Marshall*, for the sum of 10*l.* only, which was insufficient to pay the expenses attending the said sale.

The separate estate of the said *H. Rodgers* at the same period consisted of 85*l.* or thereabouts, and no more, and the separate debts due from the said *H. Rodgers* amounted to upwards of 6000*l.*, and, save as aforesaid, neither *W. Marshall* the younger nor *H. Rodgers* had any property or effects whatsoever besides their respective shares and interest in the said partnership concern of *Marshall, Rodgers & Co.*

At the time of the execution of the deed of the 1st of December, 1840, inspectors were appointed on behalf of the creditors of the said firm of *Marshall, Rodgers & Co.*

The several creditors of the firm of *Marshall, Rodgers & Co.*, who executed the deed, received the promissory notes of *W. Marshall* the elder and *J. Marshall* for the amount of the dividend of 10*s.* in the pound upon their respective debts, pursuant to and payable at the times mentioned in the deed. A separate arrangement was at the same time negotiated, and was ultimately concluded, between *W. Marshall* the elder and *J. Marshall*, acting on

1846.

In the matter of  
J. MARSHALL.  
In the matter of  
W. MARSHALL  
and another.

1846.

In the matter of  
J. MARSHALL.  
In the matter of  
W. MARSHALL  
and another.

behalf of themselves and of the firm of *Marshall, Rodgers & Co.*, and their creditors, with the Royal Bank of Liverpool the object of which was to put *W. Marshall* the elder and *J. Marshall* into the actual possession of the property and effects comprised in the deed of composition and assignment. A memorandum of the terms upon which the Royal Bank proposed to come to such arrangement, in reference to the debt due to them from the firm of *Marshall, Rodgers & Co.*, was drawn up by the bank in writing, and was in the following terms:

“The directors of the Royal Bank are desirous of meeting the views of Messrs. *Marshall*, and of the creditors of Messrs. *Marshall* and *Rodgers*, in any way which may not prejudice their security, and if the consent of Mr. *Rodger's* sureties be obtained, they would not object to the following arrangement; viz. that Messrs. *Marshall* shall guarantee payment to the bank of the sum of 7000*l.* at six and twelve months, and any balance which the bank shall not realize from their present securities. That the Messrs. *Marshall* be put into immediate possession of the iron foundry and works, and remain in undisturbed possession for twelve months, and they shall have possession of all the stock in trade, which they may work up and sell and dispose of as they shall see fit; and that they be authorized to collect all the outstanding debts. That out of the outstanding debts, the Messrs. *Marshall* be authorized to pay the creditors of *Marshall* and *Rodgers* 10*s.* in the pound, if accepted by the creditors in full. That out of the orders to be executed and the stock in hand, the Messrs. *Marshall* shall pay to the bank the 7000*l.* by the instalments above mentioned. That at the expiration of the twelve months,

the bank shall be at liberty to resume possession and to realize their securities, unless the said Messrs. *Marshall* should be then prepared to pay off the securities, or to make some other satisfactory arrangement with the bank. That Messrs. *Marshall* shall be at liberty to dispose of the foundry and works, and also the warehouses within the twelve months, with the consent of the bank, the bank receiving the purchase money."

1846.

In the matter of  
J. MARSHALL.  
In the matter of  
W. MARSHALL  
and another.

To this proposal *W. Marshall* the elder and *J. Marshall* acceded, and on the 6th day of February, 1841, testified their acquiescence therein by writing, and annexing to the said proposal of the said Royal Bank a letter in the terms following, (that is to say)

"To the Directors of the Royal Bank.

"Gentlemen,

"We are desirous that the plan suggested by you in the annexed memorandum for the arrangement of the affairs of Messrs. *Marshall, Rodgers & Co.*, shall be carried into effect; therefore, in consideration of your putting us into immediate possession of the said iron foundry and works, machinery and stock, as there proposed, we jointly and severally undertake that the several conditions and stipulations therein contained in your favour shall be duly observed and performed. Dated this 6th day of February, 1841.

"*William Marshall. John Marshall.*"

Upon the arrangement being so concluded, the Royal Bank, by whom possession had been kept from the time they had entered in the month of October, 1840, withdrew from the possession of the foundry and works, and the same, together with the engines, boilers, machinery and fixtures there, and all the stock in trade and effects of the said firm of *Marshall, Rodgers & Co.*, were taken

1846.

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 In the matter of  
 J. MARSHALL.  
 In the matter of  
 W. MARSHALL  
 and another.

actual possession of by the bankrupt, *J. Marshall*, on behalf of himself and of his father, *W. Marshall* the elder, under and by virtue of the deed of composition and assignment, and the business of the firm of *Marshall, Rodgers & Co.* was then discontinued, and *W. Marshall* the younger thereupon left Liverpool and went to live for some time in the county of Stafford, though he afterwards returned to Liverpool and acted as the clerk or agent of *J. Marshall* in disposing of the stock and effects.

*H. Rodgers* also left Liverpool and went to reside at Sheffield, and thenceforth *J. Marshall*, with the consent of *W. Marshall* the younger and *H. Rodgers*, and for the considerations mentioned in the deed of composition and assignment, continued in the actual possession of the said stock in trade and effects until the time of the bankruptcy of *J. Marshall* hereinafter mentioned.

*W. Marshall* the elder died in February, 1841.

The bankrupt, *J. Marshall*, by himself and his agents, proceeded to dispose of and deal with the stock in trade and effects formerly belonging to the said firm of *Marshall, Rodgers & Co.*, and in the month of March, 1841, he caused the stock in trade and effects, together with the machinery and fixtures upon the foundry and works, to be advertized for sale by public auction early in the month of April following. In the advertisement of the sale, the foundry and works were described as having been lately occupied by Messrs. *Marshall, Rodgers & Co.*

The sale was conducted under directions for that purpose given by and on behalf of the bankrupt, *J. Marshall*, but the greater part of the goods were bought in at the sale by *J. Marshall*, and a small part only was sold,

the proceeds whereof were by direction of *J. Marshall* paid by the auctioneer to the Royal Bank, on account of and in diminution of his liability in respect of the debt due to them from the firm of *Marshall, Rodgers & Co.*

1846.

In the matter of  
*J. MARSHALL.*  
In the matter of  
*W. MARSHALL*  
and another.

On the 28th day of April, 1841, *J. Marshall* executed docket papers for the purpose of issuing a fiat against his brother *W. Marshall*, and a docket was thereupon struck, and a fiat was issued and opened against the said *W. Marshall*, and he was declared bankrupt on the 4th day of May, 1841.

The bankrupt, *J. Marshall*, after *W. Marshall* had been so declared a bankrupt, continued in possession of the foundry and works, and of the machinery, fixtures, stock in trade and effects thereon, and continued to deal therewith as he had previously done. In May, 1841, the sheriff of Lancashire entered on the foundry and proceeded to take possession of the stock in trade and effects there under a writ of fieri facias, commanding him to levy a sum of money upon the effects of the firm of *Rodgers and Marshall*. On the 12th of May, 1841, *J. Marshall* gave to the sheriff notice of the deed of the 1st of December, 1840, and required the sheriff to remove from the possession of the goods and chattels, and the execution was thereupon withdrawn.

On the 21st of May, 1841, a fiat was issued against *J. Marshall*, who was thereupon duly found and declared a bankrupt on the 3rd of June, 1841; and on the same day the messenger under the fiat entered into possession of the foundry and works and seized the stock in trade and effects there, as being part of the estate and effects of *J. Marshall*. Assignees were appointed under the fiat.

1846.  
In the matter of  
J. MARSHALL.  
In the matter of  
W. MARSHALL  
and another.

On the 16th of June, 1841, a joint fiat was issued against *W. Marshall* and *H. Rodgers* upon the petition of *W. Vickers*, of Sheffield, merchant, and assignees were appointed.

The fiat of the 30th of April, 1841, which had previously been issued against *W. Marshall*, was, by an order of the Court of Review, dated the 8th day of May, 1842, annulled, and the proofs and previous proceedings thereunder transferred to the last mentioned joint fiat.

The act of bankruptcy on which the adjudication in the bankruptcy was founded was the execution by the bankrupts of the said indenture of the 1st of December, 1840.

Although *W. Vickers* had not executed the said deed of composition and assignment, yet he well knew that the same had been executed by the creditors generally of the firm of *Marshall, Rodgers & Co.*; he resided in Sheffield and was a friend of the family of *H. Rodgers*, and on that account had not executed the said deed of composition and assignment. He was indifferent to the payment of his debt; and he well knew that the firm of *Marshall, Rodgers & Co.*, was broken up and their business discontinued upon the execution of the deed of composition and assignment; and that *H. Rodgers*, with whom he was well acquainted, thereupon returned to Sheffield to reside there with his family.

Mr. *Vickers* did not make any claim against *Marshall* and *Rodgers*, or in any way demand or ask for payment of his debt against that firm or either of the partners thereof.

However, upon the messenger under the fiat against *J.*

*Marshall* taking possession of the said foundry and works, and the stock in trade and effects there as before-mentioned, inquiries were set on foot to ascertain whether there were any creditors of the said firm of *Marshall, Rodgers & Co.* who had not executed the said deed of composition and assignment; and it having been ascertained that the said *W. Vickers* had not executed the same, he consented to allow his name to be used by the said creditors of the said firm of *Marshall, Rodgers & Co.* as petitioning creditors under the fiat against *W. Marshall* and *H. Rodgers*. All the creditors of the firm of *Marshall, Rodgers & Co.* who had executed the deed of composition and assignment, and had received the promissory notes of *W. Marshall* the elder and *J. Marshall* for 10*s.* in the pound under the deed of composition and assignment, attended before the Commissioners acting under the fiat against *J. Marshall* and were admitted to prove against his estate upon such promissory notes, and they have since received a dividend of 1*s.* 5*d.* in the pound from the estate of the said *J. Marshall* in respect of such proofs; and, under the fiat against *W. Marshall* and *H. Rodgers*, all the same creditors who had executed the said deed of composition and assignment have been admitted to prove for the original consideration for their respective debts; the promissory notes of *W. Marshall* the elder and *J. Marshall*, given in pursuance of the deed of composition and assignment, being treated as collateral securities only with respect to the last-mentioned proofs.

The assignees of *W. Marshall* and *H. Rodgers* claimed the stock in trade and effects at and upon the foundry, and contended that the deed of December,

1846.

In the matter of  
*J. MARSHALL.*  
In the matter of  
*W. MARSHALL*  
and another.

1846. 1840, was an act of bankruptcy committed by *W. Marshall* and *H. Rodgers*, or that the assignment was clothed with a trust; and this claim being disputed by the assignees under the fiat against *J. Marshall*, it was agreed by and between the parties interested and claiming to be interested in the said stock in trade and effects that the same should be sold and the proceeds deposited with Messrs. *Moss & Co.*, bankers, Liverpool, in the joint names of the assignees of both the estates of the said bankrupts, until their respective rights should be determined in due course of law, and the same were accordingly sold, and the net sum realized by such sale was deposited in the said bank of Messrs. *Moss & Co.* The lease of the premises called "the foundry" expired on the 23rd of April, 1841, and at the expiration of such lease there were on the said premises certain fixtures which belonged to the lessees, and after the bankruptcies of *Marshall, Rodgers & Co.* and *J. Marshall* such fixtures were sold with the consent of the assignees of the said respective estates and of the said Royal Bank, and produced the sum of 257*l.* 9*s.*

In the matter of  
*J. MARSHALL.*  
In the matter of  
*W. MARSHALL*  
and another.

A question arose whether certain fixtures were annexed to the freehold and belonged to the Royal Bank as mortgagees, or whether they were goods and chattels of *Marshall, Rodgers & Co.*, and an agreement was, in the month of August, 1843, effected between the said Royal Bank and the several assignees, by which it was agreed that the Royal Bank should receive the sum of 100*l.* in full for their claim to the proceeds of the fixtures, and that the remaining sum should be paid into the bank of Messrs. *Moss & Co.* to the same account as the proceeds of the sale of the stock and effects.



This arrangement was carried into effect, and the said sum of 100*l.* was paid to the Royal Bank, and the remaining sum of 157*l.* 9*s.* was paid into the Bank of the said Messrs. *Moss & Co.* to the account aforesaid. Several small sums of money, being dividends on debts due to the said firm of *Marshall, Rodgers & Co.*, have also been received and paid into the said bank of Messrs. *Moss & Co.* to the same account. The sums so paid into the said account amount together to the sum of 4561*l.* 8*s.* 6*d.*, such sum is now remaining at the said bank with some interest accrued and accruing thereon, in the joint names of the said assignees of both the said estates. Under these circumstances the assignees of the estate of *John Marshall* presented their petition to the Court of Review, intituled in the matter of both the said bankruptcies, praying that it might be declared that as such assignees they were entitled to the sum of 4561*l.* 8*s.* 6*d.*, and the interest accrued and accruing thereon, and that the assignees of *W. Marshall* and *H. Rodgers* might be ordered to join with the said petitioners in transferring the said sum into the sole names of the petitioners, or to such other accounts as might be necessary to enable the petitioners to receive the said sum, or that the Court would be pleased to make such other order in the premises as to the Court should seem meet.

The petition came on for hearing on the 24th of June, 1844, and by an order of the Court of Review dated the 25th of the same month of June, intituled in the matters of the said bankruptcies, the Court did declare that the said sum of 4561*l.* 8*s.* 6*d.* formed part of the estate and effects of the said bankrupts *W. Marshall* and *H. Rodgers*, and was to be administered accordingly.

1846.

In the matter of  
J. MARSHALL.  
In the matter of  
W. MARSHALL  
and another.

1846.                    And it was ordered that the costs of the said petitioners and respondents of and occasioned by that application be paid to them respectively (when taxed) in manner thereafter mentioned out of the said sum of 4561*l.* 8*s.* 6*d.*

In the matter of  
J. MARSHALL.  
In the matter of  
W. MARSHALL  
and another.

And it was ordered that what should remain of the said sum of 4561*l.* 8*s.* 6*d.*, after payment of the aforesaid costs, be, together with any interest which should have accrued on the said sum of 4561*l.* 8*s.* 6*d.*, paid to the said respondents as such assignees as aforesaid, to be by the said respondents held and applied as part of the estate and effects of the said bankrupts *W. Marshall* and *H. Rodgers*; and after directing the taxation and payment of such costs, it was declared that the said order was to be without prejudice to any claim or question that might be made on behalf of the said assignees of the said estate of the said bankrupt, *J. Marshall*, with respect to any proof or claim against the estate of the said bankrupt, made in respect of bills of exchange or promissory notes given on occasion of the transaction of the 1st day of December, 1840, mentioned in the said petition.

The assignees of *J. Marshall* conceive that such order is erroneous, and that the prayer of their petition ought to have been granted, and they therefore appeal from the said order to the Right Honorable the Lord Chancellor.

And the questions for his Lordship's decision are :

Whether the said sum of 4561*l.* 8*s.* 6*d.*, or any and what part thereof, under the circumstances therein stated, forms part of the estate of *J. Marshall*, and is as such estate to be administered under his bankruptcy for the benefit of his creditors :

Or whether the same, or any and what part thereof, forms part of the estate of *Marshall, Rodgers & Co.*, to be administered in their bankruptcy for the benefit of their creditors:

1846.

In the matter of  
J. MARSHALL.

In the matter of  
W. MARSHALL  
and another.

And whether the order of the Court of Review is right.

Mr. *Bacon* and Mr. *Rolt*, for the appellants, cited *Baxter v. Pritchard* (a), *Rose v. Haycock* (b), *Fox v. Fisher* (c), and *Ex parte Thomas* (d). [The Lord Chancellor. In *Fox v. Fisher* and *Ex parte Thomas* the Court thought that the title of the administrator might have been completed at any time, and that therefore the party who neglected or omitted to complete his title might be said to have consented in the meantime to the property remaining in the order and disposition of the bankrupts.] The assignees of *Marshall* and *Rodgers* represent the creditors, who if they have now any title had it long ago, and might have issued a fiat and chosen assignees. By not doing so, they brought themselves within the principle of *Fox v. Fisher* and *Ex parte Thomas*. But, independently of that consideration, there was a sufficient consent of the true owner in this case, because the whole assigned property was in the possession of a mortgagee, who during the existence of his mortgage must be considered the true owner for the purposes of the 72nd section. [Lord Chancellor. Only to the extent of his mortgage.] The proposition has never been so limited. Like a trustee, he represents, after his estate has become absolute, the whole interest, and by his act or default can bind the mortgagor, and

(a) 1 Ad. & Ell. 486.

(b) *Ibid.* 460.

(c) 3 B. & Ald. 135.

(d) 3 M. D. & D. 40.

1846.  
 In the matter of  
 J. MARSHALL.  
 In the matter of  
 W. MARSHALL  
 and another.

those claiming under the mortgagor, as regards any other parties. Now here the mortgagees delivered over the property to the bankrupt, *John Marshall*, and suffered it to remain in his order and disposition with their consent up to his bankruptcy. The other arguments were in substance the same as those addressed to the Court of Review. See 3 M. D. & D. 674.

Mr. *Swanston* and Mr. *Prior* for the respondents.

Mr. *Bacon* in reply.

November 3.

LORD LYNTHURST.—Three points were made in this case on the part of the assignees of *J. Marshall*.

First, it was contended that the assignment by *Marshall* and *Rodgers* to *W.* and *J. Marshall* was a sale, and did not therefore constitute an act of bankruptcy.

Secondly, that the property thus assigned was at the time of the bankruptcy of *J. Marshall* in his order and disposition with the consent of the true owners, and consequently passed to his assignees.

Thirdly, that the petitioning creditor, *J. Vickers*, the only creditor who did not execute the assignment, assented to it, and that it was not competent to him therefore to impeach it.

With respect to the first objection, I am of opinion that the transaction in this case does not come within the authorities that were cited in support of it. Messrs. *W.* and *J. Marshall* by the deed of assignment became sureties for *Marshall* and *Rodgers* for the due payment of the composition to the creditors who were parties to the deed; and it is, I think, clear, from all the circumstances detailed in the special case as well as from the

deed itself, that the assignment was intended only as an indemnity to *W. and J. Marshall* as sureties for *Marshall* and *Rodgers*, and to enable them to wind up the affairs of the insolvent firm. In the event, certainly improbable, of a surplus, they would, I conceive, have been accountable to *Marshall* and *Rodgers*. I agree therefore with the Vice-Chancellor that the assignment was an act of bankruptcy, and that the case is not governed by the decisions in *Baxter v. Pritchard* and *Rose v. Haycock*, in which the facts were considered as constituting a sale, though extending to the whole property.

Then as to the second question, possession was in this case obtained under the assignment, to which *J. Marshall* was himself a party. This, as I have stated, was an act of bankruptcy, and if followed up by a fiat would divest them of the property by relation to that act. In a few months afterwards a fiat issued and assignees were appointed, who immediately asserted their right. It was impossible under those circumstances to consider the property as in the order and disposition of the bankrupt with the consent of the true owner, or to extend the decisions in *Fox v. Fisher* and *Ex parte Thomas* to a case of this description.

It remains only to examine the objections as to the petitioning creditor *Mr. Vickers*. He did not sign the deed, but it is said he assented to it. In order to bind him, some act of assent should be shown. No such act is stated in the case. He was acquainted indeed with the fact of the assignment. There was no provision in it for the payment of his debt. He made no complaint, he preferred no claim, he was merely passive, he did nothing. This would not bind him to the provisions of the deed, or deprive him of the right to become a petition-

1846.

In the matter of  
*J. MARSHALL.*  
In the matter of  
*W. MARSHALL*  
and another.

1846.      ing creditor, if in his opinion the justice of the case required it. I am of opinion therefore that the fund in dispute belongs to the estate of *Marshall* and *Rodgers*.  
 In the matter of J. MARSHALL.      The costs must be paid by the assignees of *J. Marshall*,  
 In the matter of W. MARSHALL.      and repaid to them out of his estate.  
 and another.

Ex parte THE LEICESTERSHIRE BANKING COMPANY.—In the matter of WILDERS.

*Lincoln's Inn,*  
*April 22.*

Where a partner gives a separate security for a joint debt and becomes bankrupt, the other partners remaining solvent, the creditor may have, under the separate fiat, the usual order for sale, but can only have liberty to prove for the deficiency against the joint estate.

THE petitioners were equitable mortgagees of certain separate property of the bankrupt, the mortgage being made to secure a debt due from the bankrupt jointly with certain partners who remained solvent. The prayer was for the usual order, but it sought leave to prove against the separate estate.

Mr. *De Gex*, in support of the petition, cited Ex parte *Lloyd(a)*.

Mr. *W. H. Smith* for the assignees.

The COURT made the order, the proof for the deficiency to be against the joint estate only.

(a) 3 Mont. & Ayr. 601.

1846.

Ex parte EDWARD BOWLES FRIPP and RICHARD RICKETTS.—In the matter of WILLIAM TRUMAN HARFORD PHELPS.

Westminster,  
April 22.

THIS was a petition, praying that the Commissioner might be directed to execute a deed of confirmation of an estate, which the bankrupt had sold before the bankruptcy as tenant in fee, it being now suggested that he was tenant in tail only.

Where a trader sold an estate and conveyed it as tenant in fee simple, with the usual covenant for further assurance, and became bankrupt, and it was afterwards considered that he was tenant in tail only, it was ordered that the Commissioner should be at liberty to execute a deed of confirmation to the purchaser.

One *Charles Nickolls* being seised of the lands in question in fee simple, by his will, dated the 15th of December, 1728, devised as follows: "Item, all the rest and residue of my real and personal estate whatsoever and wheresoever, I give, devise and bequeath unto my daughter *Christian Harford*, her heirs, executors, administrators and assigns, in case she lives to have a child or children, but in case she shall happen to die without having a child or children, then in such case, at her death, I devise and bequeath my said real and personal estate unto my said daughter *Elizabeth Buckler*, her heirs, executors, administrators and assigns, in case she shall have a child or children, but in case she shall happen to die without having a child or children as aforesaid, then in such case, I give, devise and bequeath my said real and personal estates unto my son *Charles Nickolls*, his heirs, executors, administrators and assigns.

The bankrupt had, under this will, (subject to an estate by the curtesy and to a mortgage) an estate either in tail or in fee, according as the estate of *Christian Harford*, his grandmother, was the one or the other of those estates.

The remaining facts appear from the following case or

1846.

Ex parte  
FRIPP  
and another.

statement, which the petitioner caused to be prepared and laid before the Commissioner (Mr. Serjeant *Stephen*).

"In 1820, Mr. *William Truman Harford Phelps* sold to *Edward B. Fripp*, Esq., some fields at Westbury, near Bristol, and conveyed them to him in fee by lease and release, but without fine or recovery, and covenanted for further assurance in the usual way. A question was made previously to the completion of the purchase, whether Mr. *Phelps* was seised in fee or in tail. Sir *Edward Sugden* was of opinion that he was seised in fee, and the title was taken. Mr. *Phelps* has since become bankrupt, and the proceedings are in the Bristol Court of Bankruptcy, before Mr. Serjeant *Stephen*.

"Mr. *Fripp* has lately entered into a treaty for sale; the title has been objected to, on the ground that Mr. *Phelps* was tenant in tail, and that the entail is not barred. Other opinions have been taken which concur in this view, and the Commissioner Serjeant *Stephen* is now respectfully applied to for his consent to execute to Mr. *Fripp* and his mortgagee a deed of confirmation of the conveyance in fee formerly made by Mr. *Phelps*, the bankrupt, by virtue of 3 & 4 Will. 4, c. 74, s. 62 (a),

(a) 3 & 4 Will. 4, c. 74, s. 62, "That where an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall have already created, or shall hereafter create, in such lands, or any of them, a voidable estate in favor of a purchaser for valuable consideration, and such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall be adjudged a bankrupt under any such fiat as aforesaid, and the Commissioner acting in the execution of such fiat shall make any disposition under this act of the lands in which such voidable estate shall be created, or any of them, then and in such case, if there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created, or being such protector, he shall consent to the disposition by such Commissioner as aforesaid, whether such Commissioner may have made under this



which confirmation Mr. *Brodie* considers to be necessary, and Mr. *Jarman* lawful, though not absolutely necessary.

1846.  
~~~~~  
Ex parte  
Farrar  
and another.

"It should be said, that in consequence of Mr. *Jarman's* opinion Mr. *Phelps* himself has been applied to for a confirmation, and after submitting the draft to his conveyancer, has executed it (a).

"The opinions which have been taken are left herewith. They are those of Sir *Edward Sugden*, Mr. *Palmer*, Mr. *Jarman*, Mr. *Hodgson* and Mr. *Brodie*.

act a previous disposition of such lands or not, or whether a prior sale or conveyance of the same lands shall have been made or not, under the said acts of the sixth year of King *George* the Fourth, and the first and second years of King *William* the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, the disposition by such Commissioner shall have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; and if at the time of the disposition by such Commissioner, in the case of an actual tenant in tail, there shall be a protector, and such protector shall not consent to the disposition by such Commissioner, and such actual tenant in tail, if he had not been adjudged a bankrupt, would not, without such consent, have been capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such actual tenant in tail, if he had not been adjudged a bankrupt, could at the time of such disposition have been capable, under this act, of confirming the same, without such consent; and if at any time after the disposition of such lands by such Commissioner, and while only a base fee shall be subsisting in such lands, there shall cease to be a protector of such settlement, and such protector shall not have consented to the disposition by such Commissioner, then and in such case such voidable state, so far as the same may not have been previously confirmed, shall be confirmed to its full extent as against all persons, except those whose rights are saved by this act: provided always, that if the disposition by any such Commissioner as aforesaid shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed against such purchaser and the persons claiming under him."

(a) It was a disentailing deed under the act in the usual form.

1846.

Ex parte  
FRIPP  
and another.

With Mr. Serjeant *Stephen's* permission, a draft of the proposed deed of confirmation shall be left with him."

The Commissioner gave the following decision in writing:—"I conceive that it is only for the benefit of creditors that a Commissioner is competent to execute any conveyance relative to the estate tail of a bankrupt. The power given by the legislature is in express words confined to that case; see 3 & 4 *Will.* c. 74, ss. 56, 57 (a),

(a) 3 & 4 *Will.* 4, c. 74, s. 56. "Any Commissioner acting in the execution of any fiat, which, after the thirty-first day of December one thousand eight hundred and thirty-three, shall be issued in pursuance of the said act passed in the first and second years of the reign of King *William* the Fourth, under which any person shall be adjudged a bankrupt, who at the time of issuing such fiat, or at any time afterwards, before he shall have obtained his certificate, shall be an actual tenant in tail of lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of such actual tenant in tail, and shall create by any such disposition as large an estate in the lands disposed of as the actual tenant in tail, if he had not become bankrupt, could have done under this act at the time of such disposition: Provided always, that if at the time of the disposition of such lands, or any of them, by such Commissioner as aforesaid, there shall be a protector of the settlement, by which the estate of such actual tenant in tail in the lands disposed of by such Commissioner was created, and the consent of such protector would have been requisite to have enabled the actual tenant in tail, if he had not become bankrupt, to have disposed of such lands to the full extent to which, if there had been no such protector, he could under this act have disposed of the same, and such protector shall not consent to the disposition, then and in such case the estate created in such lands, or any of them, by the disposition of such Commissioner, shall be as large an estate as the actual tenant in tail, if he had not become bankrupt, could at the time of such disposition have created under this act in such lands without the consent of the protector."

By s. 57, "Any Commissioner acting in the execution of any such fiat as aforesaid, under which any person shall be adjudged a bankrupt, who at the time of issuing such fiat, or at any time afterwards before he shall have obtained his certificate, shall be a tenant in tail entitled to a base fee in lands of any tenure, shall by deed dispose of such lands to a purchaser for a valuable consideration for the benefit of the creditors of the person so entitled as aforesaid, provided at the time of the disposition there be no protector of the settlement by which the estate tail converted into the base fee was created; and by such disposition the base fee shall be enlarged into as

and the former provision of the Bankrupt Act, 6 *Geo.* 4, c. 16, s. 65. If so, I should, by executing the proposed conveyance, justify the inference that I was dealing with some interest available to creditors, and at the same time dealing with it for the benefit not of creditors but of other parties, which would be contrary to my duty as Commissioner. So far therefore as this matter depends on my own discretion, I must decline to execute; but on an application to the Court of Review my view of the case, if erroneous, may be corrected, and an order made on me to execute which I shall very gladly obey.

HENRY JOHN STEPHEN."

"27th February, 1846."

1846.

Ex parte  
FRIPP  
and another.

Mr. *Russell* in support of the petition. The question as to the estate which the bankrupt took is now set at rest by *Doe d. Jearrad v. Bannister (a)*, where a devise to *S. S.* and her heirs, if she had any child, and if not, then, after the decease of her husband and herself, to *F. M.* and her heirs, was held to give an estate tail only to *S. S.* As the bankrupt was tenant in tail and had conveyed in fee with a covenant for further assurance, there would have been no difficulty under the old law, for the

large an estate as the same could at the time of such disposition have been enlarged into, under this act, by the person entitled, if he had not become bankrupt."

6 *Geo.* 4, c. 16, s. 65. "The Commissioners shall, by deed indented and enrolled as aforesaid, make sale for the benefit of the creditors as aforesaid of any lands, tenements and hereditaments, situate either in England or Ireland, whereof the bankrupt is seised of any estate tail in possession, reversion or remainder, and whereof no reversion or remainder is in the crown, the gift or provision of the crown, and every such deed shall be good against the said bankrupt and the issue of his body, and against all persons claiming under him after he became bankrupt, and against all persons whom the said bankrupt by fine, common recovery or any other means, might cut off or debar from any remainder, reversion or other interest, in or out of any of the said lands, tenements and hereditaments."

(a) 7 *M. & W.* 292.

1846.  
  
*Ex parte*  
*Fairf*  
 and another.

conveyance of the bankrupt's property to the assignees would have bound them by his covenant, and they must have executed a deed of confirmation. This was decided as early as 1765 by Lord *Northington* in *Edwards v. Applebee* (a), where the bankrupt had executed a trust deed for the benefit of his creditors, with a covenant for further assurance. The assignees filed a bill to set the deed aside, and the trustees filed a cross bill to have it confirmed. Lord *Northington* in the latter suit held that as the estate was bound by a specific covenant for further assurance from the bankrupt, and as the assignees became entitled to his interest, they were bound to convey all their estate to the trustees, and decreed accordingly. The act 6 *Geo.* 4, c. 16, s. 65 (b), altered the law, and provided that, instead of the estate passing to the assignees, the Commissioners should, in the case of an estate tail, convey the estate at once to the purchaser. In a case before the present Vice-Chancellor of England, *Ex parte Wise* (c), the bankrupt, supposing himself tenant in fee simple, but being only tenant in tail, deposited his title deeds by way of equitable mortgage. It was contended that the act 6 *Geo.* 4, c. 16, had made a difference, and that as the estate did not vest in the Commissioners, the mortgagee could have no equity against them. The Court, however, ordered that the estate should be sold subject to the equitable mortgage (d).

(a) 2 Bro. C. C. 652, note.

(b) See *ante*, p. 297, note.

(c) Mont. & M'A. 65.

(d) Quære, however, whether this order did not leave the question open. See the whole question fully discussed and all the authorities cited in *Ex parte Somerville*, 1 M. & A. 408; 3 D. & C. 668, where the Commissioner's opinion points out the differences between the 6 *Geo.* 4, c. 16, s. 65, and the 3 & 4 *Will.* 4, c. 74, ss. 56, 57, then about to come into operation.

Mr. *Lee*, *amicus curiæ*. A case of this kind came before Lord *Thurlow* in *Pye v. Daubuz*(a), where the bankrupt was tenant in tail and made a mortgage in fee with a covenant for further assurance. In this case the counsel for the defendant laid down the principle on which the learned Commissioner appears to have proceeded, that the assignees held the estate for the general creditors, and not for the mortgagee, and they cited a case of *Beck v. Welsh* (b), where the Court of Common Pleas had so held. Lord *Thurlow* said the cases appeared to be contradictory, the Court of Common Pleas considering *the statute as declaring the use of the bankrupt's estate* for all his creditors, but that his Lordship should have agreed with Lord *Northington*, conceiving the object of the statute to be merely for the purpose of barring the issue and the remainders over, and not to alter the disposition of the estate to the prejudice of any heirs at law or in equity prior to the bankruptcy. The case stood over at the desire of the solicitor general (afterwards Lord Eldon), but Lord *Thurlow* ultimately decreed that the assignees should convey,

1846.

Ex parte  
FAIRF  
and another.

The COURT ordered that the Commissioner should be at liberty to execute the deed of confirmation, and that the assignees should convey, the petitioner paying all the costs.

(a) 3 Bro. C. C. 506, 5th edit. by Belt.

(b) 1 Wils. 276.

1846.



Ex parte LANE.—In the matter of LENDON and  
LENDON.

April 22.

A parol agreement is sufficient to convert a separate into a joint debt, such an agreement not being "a promise to answer the debt of another" within the Statute of Frauds, but the creation of a new debt in consideration of the former being extinguished.

THIS was a petition by way of appeal from the rejection of a proof by the Commissioner. The bankrupts were father and son, and the question in dispute was whether a certain debt originally due to the petitioner from the father alone had been converted into the joint debt of the two. The petitioner was examined *vivâ voce* for the purpose of establishing the conversion of the debt. Her evidence was to the effect that at the formation of the partnership all parties considered that the firm became liable to pay the debts, that one of the bankrupts told her so, and that she assented, and that the subsequent transactions proceeded on that footing.

Mr. *Swanston* and Mr. *Kinglake* appeared in support of the petition.

Mr. *Bacon* and Mr. *Terrell* for the assignees submitted that evidence of a parol agreement to convert the debt was insufficient, the agreement being to charge a person upon a special promise to answer for the debt of another, and therefore required to be in writing by section 4 of the Statute of Frauds. This objection was argued separately from the rest of the case.

Mr. *Swanston* and Mr. *Kinglake* in support of the petition. It is true that this objection has never before been formally taken, but it is disposed of impliedly in several cases, such as *Ex parte Jackson* (a), *Ex parte*

(a) 1 Ves. jun. 141.

*Peele(a)*, *Ex parte Bonbonus(b)*, *Ex parte Williams(c)*,  
*Ex parte Clowes(d)*, *Ex parte Kedie(e)*. The reason  
 why the Statute of Frauds has never been held to apply  
 to such a case as this has doubtlessly been that the agree-  
 ment is not to pay the debt of another, but that it is a  
 new debt, the consideration for which is the extinction of  
 the former debt.

1846.  
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 Ex parte  
 LANZ.

Mr. Bacon and Mr. Terrell for the assignees. It is  
 impossible to contend that a contract of this description  
 is not a special promise to answer the debt of another.  
 The point has not been decided by any of the cases  
 cited, for in none of them is the Statute of Frauds  
 referred to. And this has been caused probably by the  
 existence in all these cases of some equitable circum-  
 stances which prevented the party from relying on the  
 statute, as in the familiar case of a part performance of  
 an agreement. [The *Chief Judge*. If the original debt  
 is extinguished how can the Statute of Frauds apply?] Here  
 no stipulation was entered into on the formation of  
 the partnership; nothing but an alleged common mistake,  
 to the effect that the son by becoming partner became  
 liable to the father's debts.

THE CHIEF JUDGE.—If *A.* be a creditor of *B.*, and  
*B.* and *C.* purpose to enter into, or have entered into,  
 partnership, and say to *A.* "we wish this debt to be a  
 debt from us both and we will pay it," and *A.* accedes to  
 that, although there is no writing, the agreement is valid  
 and effectual, and is not impeached or affected by the  
 Statute of Frauds. The effect of such an agreement

(a) 6 Ves. 602.

(c) Buck, 13.

(e) 2 D. & C. 321.

(b) 8 Ves. 540.

(d) Bro. C. C. 595.

1846.

Ex parte  
Lane.

is to extinguish the first debt, and for a valuable consideration to substitute the second debt. These very words need not be used by the parties, if there is sufficient to show that the intention was so ; that will be as effectual as if the most formal expression had been given to the intention. The question therefore is, whether there is now in evidence sufficient to satisfy the Court as a judge of fact that it was the intention of the bankrupt and the petitioner to substitute the joint for the separate liability. I am of opinion upon the evidence that all parties considered that the *trade*, (as the petitioner expressed herself,) that is, the *trade* as changed by the admission of the son, became or continued to be indebted to the petitioner. I am of opinion that a statement to this effect was communicated to the petitioner by the bankrupts, (her uncle and cousin,) or one of them, that she acceded to the statement, and that all the transactions between the parties at the formation of the partnership proceeded on that basis. There is sufficient evidence to convince my mind that it was in effect agreed between the three that the separate debt of the father should become the joint debt of the father and son. The pecuniary transactions, after the partnership, proceeded more clearly, if possible ; but, at all events, clearly upon the same footing. The conclusion therefore at which I arrive is, that if any sum is due to Miss *Lane* on this account it is a joint debt from both the bankrupts. The costs of the application must come out of the joint estate, including the expenses of the witnesses coming, staying and returning.

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Ex parte ANDREW VAN SANDAU.—In the matter  
of MARTIN,

and

Ex parte PETER BRUCE TURNER and GEORGE  
HENSMAN.—In the same matter.

1846.

Before Lord  
Lyndhurst, C.

April 30,  
May 6,  
July 29, 1846,  
and  
April 23, 1846.

A FORMER hearing of the first of the above petitioners is reported *ante*, pp. 30, 55, where the facts are stated. On the dissolution of the injunction, the action in the Court of Queen's Bench proceeded, and the demurrer was allowed on two grounds, *first*, that it did not appear on the pleadings that Sir *George Rose* was a judge of the Court at the time of issuing the warrant; *secondly*, that a single judge of the Court had no power to cause any one to be arrested by his *individual* warrant for a contempt of the Court itself. See *Van Sandau v. Turner*, 6 Q. B. 773. Mr. *Van Sandau's* petition now came on again to be heard on the points undisposed of.

Another petition, presented by Messrs. *Turner* and *Hensman*, also came on to be heard at the same time. It was addressed to the Lord Chancellor and, after setting out the substance of all the proceedings in the matter, it prayed that it might be heard at the further hearing of Mr. *Van Sandau's* petition of appeal, and that Mr. *Van Sandau*, his attorney, solicitor and agent, and every of them, might be restrained by his Lordship's order and injunction from further proceedings in the action, and from commencing or prosecuting any other action or proceed-

1. Although an order of commitment should contain an express adjudication that a contempt has been committed, the want of an express adjudication is not sufficient ground for discharging the order.

2. Such an order may direct the party committed to pay the costs of the party complaining, but not his costs, charges and expenses.

3. When the party complaining obtained a warrant for the apprehension of the party ordered to be committed and delivered it to the officer by whom it was executed, and afterwards the party committed was discharged on his own application, and

various orders were made founded on the commitment, and it afterwards appeared that the warrant was by an oversight not sealed. *Held*, that the commitment was invalid—that the consequential orders ought to be discharged, and that the party committed was entitled to recover damages from the party obtaining the process.

4. On a petition to the Court of Review for an injunction to restrain an action in which the plaintiff has demurred to the plea, the Court makes a qualified order restricting the plaintiff as to the grounds of demurrer. On appeal, this order is discharged, and the respondents present a petition to the Lord Chancellor for an unqualified injunction. *Held* to be an original petition, which ought not to be presented to the Lord Chancellor, and dismissed with costs.

1846.

Ex parte  
VAN SANDAU.  
Ex parte  
TURNER  
and another.

ings at law against the petitioners, or either of them, in respect of the judgment and order of the Court of Review of February 3, 1844, or of the warrant of commitment issued in pursuance thereof, or of the imprisonment of Mr. *Van Sandau* under or by virtue of the judgment, order and warrant, the petitioners being ready and willing and thereby offering to abide by any order which the Lord Chancellor might make in the premises.

In the course of the hearing the warrant of commitment was produced. It was as follows:—

In Bankruptcy. Court of Review.

In the matter of *John Martin*, a Bankrupt.

Whereas by an order of this Court, made in the above matter upon the 4th day of February last, it was ordered that *Andrew Van Sandau*, in the said order mentioned, should stand committed to the Queen's Prison for his contempt: These are therefore to will and require you forthwith upon receipt hereof to make diligent search after the body of the said *Andrew Van Sandau*, and wheresoever you shall find him to arrest and apprehend him and him safely convey to the Queen's Prison, there to remain until the further order of this Court, willing and requiring all mayors, sheriffs, justices of the peace, headboroughs, constables and all other her Majesty's loving subjects to be aiding and assisting to you in the due execution of the premises as they tender her Majesty's service, and will answer the contrary thereof at their peril, and this shall be to you and any of you who shall do the same a sufficient warrant. Dated the 19th day of February, 1844. (Signed) *Geo. Rose*, (L.S.)

To Mr. *William Henry Allen*,

Tipstaff of the Court of Review.

It appeared however that the warrant was not sealed, the wafer having been prepared upon it for the seal of the Court, but no impression of the seal being visible.

1846.  
  
 Ex parte  
 VAN SANDAU.  
 Ex parte  
 TURNER  
 and another.

On Mr. *Swanston* proceeding to open Messrs. *Turner* and *Hensman's* petition, Mr. *Bagshawe* and Mr. *Rolt* for Mr. *Van Sandau* took a preliminary objection that the petition was an original one, and ought not to have been presented to the Lord Chancellor but to the Court of Review. They referred to *Ex parte Benson (a)*, *Ex parte Low (b)*, *Ex parte Stubbs (c)*.

Mr. *Swanston*, Mr. *Kenyon Parker* and Mr. *Simon* in support of the petition. This is not substantially an original petition, it is in the nature of an appeal. It would be most inconvenient, when the question is under discussion here, to go again to the Court of Review.

The LORD CHANCELLOR held that the petition was irregular and dismissed it with costs.

The further hearing of Mr. *Van Sandau's* petition then proceeded.

Mr. *Bagshawe* and Mr. *Rolt* for Mr. *Van Sandau*. The Court of Queen's Bench has decided that the warrant under which Mr. *Van Sandau* was committed is an invalid instrument, being under the hand of one judge of the Court only. It appears further that it is invalid on another ground, viz., that there is no seal. The 31st of the rules and orders of the Court of Bankruptcy of

(a) 1 D. & C. 324.

(c) Mont. & Ch. 511; 3 Dea. 549.

(b) 1 M. & A. 189; 1 D. & C. 30; 1 Coop. Sel. Cas. 154.

1846.

Ex parte  
VAN HANDEAU.  
Ex parte  
TURNER  
and another.

January 12th, 1832, provide that all the process of the Court of Review shall be under the seal of the Court of Bankruptcy. The commitment was consequently illegal, and all the orders and proceedings consequent upon it are bad and must be discharged with costs.

Mr. *Swanston*, Mr. *Kenyon Parker* and Mr. *Simon* for the respondents. By the course which the appellant has taken in the action, the points, on which your Lordship desired to be assisted by the decision of a Court of law, remain untouched. The Court of Queen's Bench has not decided that the order of commitment contains no sufficient adjudication of a contempt having been committed, nor has that Court decided that a single judge of the Court of Review cannot commit. The decision turned on the pleadings merely. Your Lordship could not decide against the validity of the order on the ground that it contains no express adjudication without impeaching the validity of the forms which have been used both in Bankruptcy and in the Court of Chancery for years. The common form of commitment for breach of an injunction contains no adjudication, it merely states the facts which constitute the contempt; *Seton on Decrees*(a). And there can be no doubt that, on search, many precedents might be found of orders of commitment in Chancery in which there is no adjudication.

Next, as to the direction that the appellant should pay costs, charges and expenses. That is also disposed of by the constant course of practice in chancery and bankruptcy. In *Bullen v. Ovey* (b), where a motion was made to commit a party for a breach of an injunction, the Court thought the breach not contemptuous

(a) p. 434.

(b) 16 Ves. 141.

and did not commit, but ordered the defendant to pay the costs. A similar order was made in *Leonard v. Atwell* (a); and in *Bishop v. Willis* (b), a solicitor who had put counsel's name to an answer without authority was committed, and ordered to pay the costs incurred in respect of scandalous matter in the answering. All these cases show that the Court has power to order a party guilty of contempt to pay costs without such an order being made a condition of his discharge.

The want of a seal to the warrant arose from some neglect in the officer, and cannot, in this jurisdiction, be held to invalidate the process.

Mr. *Bagshawe* in reply. In none of the cases referred to was any adjudication necessary, the committal being for a violation of an order of the Court. Even if the order here were sanctioned by the practice in bankruptcy, the Court of Queen's Bench has, in *Green v. Elgie* (c), decided that such orders are invalid.

LORD CHANCELLOR. — Before deciding this case I should wish to see precedents of orders of commitment.

It was afterwards agreed that the whole matter, including the damages and costs in the action at law, should be decided by the Lord Chancellor, and that the action should not proceed.

On this day the case came on to be argued as to July 29, 1845: damages and costs.

1846.

Ex parte  
VAN SANDAU.  
Ex parte  
TURNER  
and another.

(a) 17 Ves. 386.

(b) 5 Bea. 83, n. (c).

(c) 5 Q. B. 99.

1846.

Ex parte  
VAN SANDAU.  
Ex parte  
TURNER  
and another.

Mr. *Humfrey* and Mr. *Simon* for the respondents. Messrs. *Turner* and *Hensman* ought not to be ordered to pay any damages or costs. They only put in motion a Court of competent jurisdiction, against which a contempt had been committed. The proceedings thenceforth were those of the Court to protect its own authority. In *West v. Smallwood (a)*, a master went before a magistrate and laid an information, under the Masters and Servants' Act, against a builder, whom he employed. The magistrate, thinking that he had jurisdiction, granted a warrant, and the master accompanied the officer who executed the warrant and pointed out the builder to him. It turned out that the magistrate had no jurisdiction, but the master was held not liable in trespass, no malice having been proved. Baron *Bolland* there said "In the case of an act done by a magistrate, the complainant does no more than lay before a Court of competent jurisdiction the grounds on which he seeks redress, and the magistrate, erroneously thinking he has authority, grants the warrant." So, in this case, Messrs. *Turner* and *Hensman* did no more than bring before the Court the fact of the contempt having been committed. All that followed was done by the Court. In *Cooper v. Harding (b)* the solicitor to a fiat applied to a Commissioner in bankruptcy for a warrant to apprehend a person who refused to come and be examined unless his expenses were tendered. He obtained the warrant and caused the messenger to arrest the person. Although in that case the Commissioner had said that the expenses ought to have been tendered, and that the parties must take the warrant on their own respon-

(a) 3 Mees. &amp; Wels. 418.

(b) 9 Jurist, 777.

sibility, yet the Court held that the solicitor was not liable in an action of trespass for false imprisonment.

1846.

Ex parte  
VAN SANDAU.  
Ex parte  
TURNER  
and another.

Mr. *Cleasby* for Mr. *Van Sandau*. The only question is, whether an action of trespass is maintainable against a person who actively interferes and procures the imprisonment of another under a process which is invalid. That question is settled beyond controversy. *Barker v. Braham* (a), *Codrington v. Lloyd* (b). The case is just the same as if Messrs. *Turner* and *Hensman* had requested Sir *George Rose* to issue a paper authorizing the messenger to take Mr. *Van Sandau* into custody. They bespoke the order, and charged Mr. *Van Sandau* with the costs of it among the costs which he was ordered to pay to them. If a process is set aside, the party moving for it is liable. In *West v. Smallwood* the party would have been held liable if his participation in the proceedings had been proved, and the same remark applies to *Cooper v. Harding*.

Mr. *Humfrey* in reply.

*Cur. adv. vult.*

The LORD CHANCELLOR.—It has been agreed between the parties in this case that all the matters in controversy between them, including the action in the Court of Queen's Bench, should be left to my decision, and I have, in order to prevent further litigation, undertaken the task of finally settling these disputes.

The first question to be considered is the validity of the order of commitment of the 4th February, 1844. The order recites a petition charging Mr. *Van Sandau*

(a) 3 Wils. 358.

(b) 8 Ad. & Ell. 449.

April 23, 1846.

1846.



Ex parte  
VAN SANDAU.  
Ex parte  
TURNER  
and another.

with having written and published a libel reflecting on the conduct of the petitioners as solicitors in a matter depending in the Court of Bankruptcy and upon the learned Chief Judge of the Court of Bankruptcy.

The libel is set out in a schedule to the petition and in the order, and the petitioners pray that Mr. *Van Sandau* may be committed to the Queen's Prison for his contempt of the Court, and that a warrant may issue for that purpose, and that Mr. *Van Sandau* may be ordered to pay to the petitioners the costs, charges and expenses of that application and incident thereto.

When this case was before me on a former occasion I observed that the main question as to the validity of the order would depend upon the consideration as to whether there was in this case a sufficient adjudication of a contempt having been committed.

The order is in these terms: That the said *Andrew Van Sandau* do stand committed to the custody of the keeper of the Queen's Prison for his contempt of this Court in writing, printing and publishing the aforesaid printed paper so set out as aforesaid in the schedule to the said petition.

The sufficiency of the order was questioned in the action which was then depending in the Court of Queen's Bench. The learned judges of that Court did not, however, decide the point; defects in the warrant of commitment rendered it unnecessary. The question therefore still remains to be determined. It was said on the part of the respondents that when the Court orders a party to be committed for his contempt in writing and publishing a paper which is set out in the order, this amounts to an adjudication. It was contended that it was a sufficient averment that he had written and pub-



lished the paper so set out, and that in so doing he had been guilty of a contempt. If this form of order had been used for the first time upon the present occasion, and there were no precedents to appeal to on the subject, I should have come to the conclusion that the order was insufficient. I should have considered it necessary that there should have been a direct and distinct adjudication, and not by way of inference and argument merely, that the party accused had committed the act complained of and that such act was a contempt of the Court; that the order ought in these respects to have contained precise statements corresponding in substance with the order of Lord *Cottenham* in the case of *Mr. Lechmere Charlton*, of Lord *Brougham* in *Wellesley v. The Duke of Beaufort*, of Lord *Hardwicke* in the case of *Martin*, in 1747, and of the same learned judge in some other cases; but I find upon inquiry and upon examination of the precedents in cases of commitment for contempt, that there are so many instances at different periods upon the records of the Court in which the form used in the present case has been adopted, and without question, that I think I should not be justified in discharging the order upon this objection.

In the case of the printer of the *St. James's Evening Post* (a), it appears that certain libellous observations had been published relative to the proceedings and parties in a cause depending in the Court of Chancery. Complaint was made to the Court, and it was prayed that the parties might stand committed to the prison of the Fleet, which was ordered accordingly. The order is in substance the same as in the present case. After stating the complaint and referring to the evidence, it runs thus:—

1846.

Ex parte  
VAN SANDAU.  
Ex parte  
TURNER  
and another.

(a) 2 Atkins, 469.

1846.

Ex parte  
VAN SANDAU.  
Ex parte  
TURNER  
and another.

“ It is ordered, that *Mary Read* and *John Hugginson* for their contempt of this Court do stand committed to the prison of the Fleet.” So in *Morgan v. Jones*, 1745, before the same learned judge (Lord *Hardwicke*), the charge was that *Lettice Jones* had beaten the person who had served a subpœna upon her. The order, after stating the complaint set forth in the affidavit, proceeded thus:—“ It is ordered, that the said *Lettice Jones* be committed to the prison of the Fleet for her contempt in beating the person who came to serve the said subpœna.” So in *Totherby v. Preston*, also before Lord *Hardwicke*, on the 26th March, 1748, the complaint was that *Purnell* had married a ward of the Court, and it was ordered that *Purnell* for the said offence should stand committed to the prison of the Fleet. A like form of order was adopted in a similar case by the Lord Chancellor in November, 1751, and by Lord *Eldon* in the case of *Priestly v. Lamb*, reported in 5 Vesey, 420.

In the matter of *Quick*, 20th December, 1806, the petitioner complained of the publication of a case then before the Court accompanied with reflections on the Court and the parties. It was ordered (as in the present instance without any express adjudication) that *Thomas Crowe* and *Mary* his wife, for their contempt in writing and causing the said writing to be printed and published, and the said *James Delahay* for his contempt in printing and publishing the same, do stand committed to the prison of the Fleet.

It is unnecessary to proceed further in citing precedents of this nature; for although I consider the form of the order adopted by Lord *Cottenham* in *Lechmere Charlton's case* and the other forms to which I before referred as the more proper and correct forms, yet I can-

not venture in the face of these precedents to discharge the present order as insufficient and invalid.

Another objection made to the order is, that it directs the payment by Mr. *Van Sandau* of the costs of the application. It certainly is not usual in cases of commitment for contempt to direct in the order of commitment that the party committed should pay the complainant's costs.

The ordinary course is to confine the order merely to the commitment; but when the party applies to be discharged, the Court, if it thinks proper, directs the payment of the costs as a condition of his liberation. I have been furnished with many precedents upon this subject, some of them in cases of great and aggravated misconduct, in all of which the order of commitment is silent as to the costs, but which were afterwards ordered to be paid as a condition of the offender's discharge.

But although this is the usual course of proceeding, yet as the Court of Review had jurisdiction over the subject-matter of the petition, it had a right to adjudicate as to the costs in the order of commitment by its general authority. In cases where application is made to commit for a contempt in the breach of an injunction, and the Court decides that a breach has been incurred, but not a contemptuous breach, and there is consequently no commitment, the Court will order the defendant to pay the costs of the application; *Bullen v. Ovey* (a). *Leonard v. Attwell* (b) is another case to the same effect. The inference from these cases is, that the postponement of any order as to the costs where the party is committed is merely a rule of convenience, and not binding on the Court. A further objection has been made under this

1846.

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Ex parte  
VAN SANDAU.  
Ex parte  
TURNER  
and another.

(a) 16 Ves. 141.

(b) 17 Ves. 385.

1846.

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Ex parte  
VAN SANDAU.Ex parte  
TURNER  
and another.

head, that the order is not confined to costs but directs the payment also of the petitioner's charges and expenses. I think the order ought not to have gone to this extent, I must therefore direct it to be varied, by striking out the words "charges and expenses." The consequence will be, that if Mr. *Van Sandau* insists upon it, there must be a new taxation under this order; in other respects the order must be affirmed.

Next as to the order of the 8th February, 1844; it was founded upon an application to vary the minutes of the former order, but not upon the ground to which I have just adverted. There is no reason, therefore, to disturb this order, more especially as the minutes have no longer any operation, the order founded upon them having been passed and entered. There is nothing to impeach the other order of the same date, the 8th February, 1844, or the two orders of the 17th of the same month of February.

This brings me to the consideration of the warrant under which Mr. *Van Sandau* was arrested, and which bears date on the 19th February, 1844. The original warrant was produced at the hearing. By some mistake or negligence, the seal of the Court was not affixed to it. This is contrary to the 31st order of the rules and orders of the 12th January, 1832, which requires that the process of the Court should be under the seal of the Court. Without therefore entering into the consideration of the other objections which were argued at the bar, I am of opinion that this defect rendered the warrant invalid. Mr. *Van Sandau* afterwards applied for his discharge; two orders of the same date, viz. the 21st February, 1844, the one a conditional and the other an absolute order, were made for his discharge.

Considering that he had been apprehended under an insufficient warrant, I think I ought to discharge the conditional order. The other of course must remain. The consequence of discharging the conditional order will be, that Mr. *Van Sandau* will be entitled to receive back the costs of that order.

1846.

Ex parte  
VAN SANDAU.  
Ex parte  
TURNER  
and another.

The only question that remains to be decided relates to the action depending in the Court of Queen's Bench. I am of opinion that the plaintiff is entitled to a verdict against the defendants upon the issue joined on the plea of not guilty. But adverting to all the circumstances before me, and to the fact that the action could have been maintained only in consequence of a defect in the course of the proceedings, I think very moderate damages will be sufficient to satisfy the justice of the case. I accordingly shall assess such damages at 10% upon the whole record, and direct the taxing master of the Court of Bankruptcy to tax the costs of the action as they would be taxed in the Court of Queen's Bench (a).

(a) After the judgment was concluded,

The LORD CHANCELLOR said, that for a particular reason he wished to make an observation upon a statement, reported to have been made at a former hearing of this case (*ante*, p. 56), viz. that his Honor the Chief Judge declined introducing into the special case facts which the appellant's counsel considered important. The case had been referred to Sir *George Ross* to be settled as to some portion of it, and had never come before his Honor the Chief Judge to be finally settled; consequently, that learned judge could not possibly have rejected any passage from it, and the statement must have arisen from a misapprehension of the counsel or of the reporter.

Mr. *Bagshawe* said he had considered himself warranted in making the statement in question by the circumstance that his Honor the Chief Judge, in the discussions respecting the settlement of the special case, intimated his opinion that the original judgment in *Ex parte Glaister*, which had led to the publication in question, ought not to be set out; and by a note in the margin of the draft special case itself, so far as it had been settled by Sir *George Ross*, stating that the Chief Judge had directed the judgment in *Ex*

1846.



Ex parte THOMAS SEDDON BARTON and  
JAMES JENKINS BIRCHALL.—In the mat-  
ter of HENRY CHARLES.

April 29.

A purchase by  
brokers, in pur-  
suance of the  
order of a cus-  
tomer, of shares  
in a projected  
railway com-  
pany, provi-  
sionally regis-  
tered, *held*  
not illegal, but  
a sufficient  
ground for the  
admission of a  
proof tendered  
by the brokers  
for the loss  
occasioned  
by the non-  
completion of  
the purchase by  
the customer.

THE petitioners were sharebrokers at Manchester, and they now appealed from the rejection of a proof tendered by them under the following circumstances.

On the 14th of October, 1845, the petitioners received instructions from the bankrupt to purchase for him fifty shares in a company called the Boston, Newark and Sheffield Railway Company, which was provisionally registered according to the act 7 & 8 Vict. c. 110. They made the purchase accordingly for 31*l.* 12*s.* 6*d.*, which they paid, and on the same 14th of October they communicated to the bankrupt the fact of such purchase having been made on his behalf.

The bankrupt not having paid for the shares, the petitioners sold them on the 7th of November for 17*l.* 17*s.* 6*d.*, and on the same day communicated to the bankrupt the fact of such sale. For the deficiency of 143*l.* 15*s.* they tendered a proof under the fiat, which was rejected by the Commissioner, but it did not appear on what grounds. They now prayed that the proof might be admitted. In support of the petition, it was sworn that the bankrupt authorized the resale, but this

*parte Glaister* to be omitted. There had been no intention to misrepresent anything.

The LORD CHANCELLOR said, he was quite sure of that, and he should not himself have thought any explanation necessary, as it was no imputation upon a judge to say that he declined introducing into a special case something which he considered immaterial. However, in this case, it was clear that the passage could not have been rejected from the special case by his Honor the Chief Judge, as the matter had not arrived at the stage at which such rejection could have taken place.

was denied by the affidavit of the bankrupt. The rules of the Manchester Stock Exchange were put in evidence, containing among others the following: 34. The buyer of shares or stock requiring transfer (or not transferable to bearer) shall render to the seller the name of the transferee within six clear business days from the day of sale, or in default thereof the seller shall be at liberty to insert the name of the buying broker, after having given him twenty-four hours notice in writing of such his intention. Shares or stock sold shall be paid for before four o'clock P.M. on the third business day after the buyer has been served with a notice that they are ready for delivery, failing in which a resale may take place at the close of the second meeting on the following or fourth day. 38. All losses, costs and charges occasioned by selling out or buying in of stock or shares shall be borne and paid by the party in default.

1846.  
  
 Ex parte  
 BARTON  
 and another.

The bankrupt however deposed that he was ignorant of the rules of the Stock Exchange.

Mr. *Russell* and Mr. *Cholmeley*, in support of the petition, cited *Young v. Smith* (a) and *Mitchell v. Newark* (b).

Mr. *Bacon* and Mr. *Rolt* for the assignees. It is understood that these cases are the subject of appeal, and it cannot be regarded as settled that the act 7 & 8 Vict. c. 110, s. 26, does not extend to railway companies.

The CHIEF JUDGE.—The petitioners in this case have claimed a small sum upon a transaction which is alleged to be illegal by reason of the provisions of a statute

(a) 4 Railway Cases.

(b) 10 Jur. 319.

1846.

Ex parte  
BARTON  
and another.

passed in the year 1844; a statute, the interpretation of which in several respects seems fairly open to considerable difference of opinion. I think that the burden of establishing the alleged illegality lies upon those who assert it. The only decision produced upon the point is one pronounced in January in this year, and is the unanimous decision of the Court of Exchequer, that Court consisting at the time of three judges, and the judgment being in favor of the legality of such a transaction as this is. Upon a mere question of proof, under such an act of parliament as this, ought I not, whatever my own doubts may be, to follow that case as an exposition of the law until it shall receive a different construction? I am of opinion, without expressing, and indeed without forming, any judgment of my own upon the true construction of the act, that the better mode of performing my duty will be to abide by the decision of the Court of Exchequer. I give no opinion of my own. I think it a very difficult and very doubtful question. I do not know upon what ground the learned Commissioner proceeded. The parties must be at liberty to go before the Commissioner and establish such proof as they may be able, and the statute is not to be considered as a ground of objection, or as rendering the transaction illegal. The assignees do not admit that the sale was authorized by mercantile usage. If they object to the proof of the loss upon the sale, the petitioners may deliver the scrip, and prove for the whole purchase money.

The assignees, by their counsel, elected to have the proof made of the deficiency.

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1846.

Ex parte ALFRED BISHOP BUTTERFIELD.—

In the matter of MARY BUTTERFIELD and  
THOMAS ARCHER BUTTERFIELD.

A TESTATOR named *Thomas Butterfield* carried on at Royston the business of a draper up to the time of his death, which happened in the month of June, 1832.

By his will he devised all his freehold estates to his executors in trust for sale, and he gave to his executors and the survivors and survivor of them, and the heirs of such survivor, power to sell his copyhold estates, and directed that the proceeds of such sale should become part of his personal estate; and after making certain specific bequests out of his personal estate, he bequeathed the residue thereof to his executors in trust thereout to pay a certain annuity and certain legacies, and, among others, legacies of 1500*l.* to each of his children who should be living at his decease, or born in due time afterwards, on their attaining their respective ages of twenty-one years, and to pay the interest and yearly produce of all the residue of his personal estate, and the produce of his real estate, to his wife *Mary Butterfield* (one of the bankrupts) for her life, and after her death upon trust to pay and divide his said real and personal estate among his children as therein mentioned. And his said will contained the following proviso or bequest:

—“And I hereby direct and declare that it shall be lawful for my said beloved wife to retain in her hands, and to use and employ any sum or sums of money, not exceeding 6000*l.* in the whole, in carrying on the trades or businesses in which I may be engaged at my decease,

May 6.  
A testator directed that it should be lawful for his wife to retain in her hands and employ in his business any part of his assets not exceeding 6000*l.*, so long as she should think fit if she should continue his widow, and appointed her and his son executor and executrix. The widow took the son into partnership with her in the trade, and they both became bankrupts. Held, that the use of the 6000*l.* in this trade was not an employment of it in the testator's business according to the direction of the will, but was a breach of trust on which proof might be made against the joint estate.

1846.

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Ex parte

BUTTERFIELD.

or any part thereof, for and during so long a time as she may think fit, if she shall continue my widow. And I direct that all the rest of my personal estate, except the said 6000*l.*, shall be converted into money and laid out in government or real securities in the names of my executors as soon as conveniently may be after my decease; but in case my said wife shall marry again after my decease, then and in that case I direct that the said 6000*l.* be no longer continued in her hands, but shall be immediately paid in and invested by my executors in government or real securities at interest, but for the benefit of my said wife, who shall lose by marrying again only the custody and possession of 6000*l.*, and not any beneficial interest therein." And the testator appointed his wife *Mary Butterfield*, his son *Thomas Archer Butterfield*, and his cousin *Walter Butterfield*, joint executors and executrix of his will. The will and a codicil not affecting it in any material particular were proved by the widow and the son *Thomas Archer Butterfield* only, *Walter Butterfield* having renounced probate and disclaimed.

The testator left seven children, some of them then infants.

The widow and *Thomas Archer Butterfield*, in August, 1832, agreed to carry on the business together as partners in equal shares, and thereupon the widow let *Thomas Archer Butterfield* into possession jointly with her of all the stock in trade and money left by the testator at his decease, but nothing was done as to such partnership between the testator's death and August, 1832.

The widow and son continued to carry on the busi-

ness in partnership from August, 1832, until the date of the fiat, but no articles of partnership were entered into.

1846.  
  
 Ex parte  
 BUTTERFIELD.

*Thomas Archer Butterfield* alone managed and conducted the business, and his mother never interfered in the management of it.

About Christmas, 1833, she ceased to reside at Royston, and from that time until the time of the fiat she lived in London or its neighbourhood.

Messrs. *Fordham & Co.* of Royston were the testator's bankers, and the widow and *Thomas Archer Butterfield* paid the monies received in respect of the testator's estate to their bankers to an account intituled "*Mary Butterfield and Son.*" The monies received on account of the trade were also paid to the same bankers to the same account, and the monies with which the widow and *Thomas Archer Butterfield* paid their trade accounts and made various payments on account of the testator's estate were drawn out of the same mixed fund. The bankers knew that the widow and *Thomas Archer Butterfield* were partners.

On December 30th, 1845, the fiat issued on the bankrupt's own petition.

At the date of the fiat the receipts of the widow and *Thomas Archer Butterfield* in respect of the capital of the testator's real and personal estate, including the testator's stock in trade, exceeded the payments in respect of such capital by the sum of 8921*l.* 5*s.* 9*d.*

In pursuance of an order of the Court of Review, dated May 9th, 1846, made on the petition of *Alfred Bishop Butterfield*, one of the testator's children, giving him liberty in that behalf, he, on the 23rd day of March,

1846.

Ex parte  
BUTTERFIELD.

1846, tendered before Mr. Commissioner *Holroyd*, the Commissioner acting in the prosecution of the said fiat, a proof against the joint estate, on behalf of himself and the other persons beneficially interested under the will, for 8921*l.* 5*s.* 9*d.*

It was in evidence before the Commissioner that the sum of 6000*l.*, part of the sum of 8921*l.* 5*s.* 9*d.*, and including the stock in trade, had been used by the widow and *Thomas Archer Butterfield* in their trade, carried on by them in partnership together as aforesaid, and was so used with their knowledge; and it was proved that independently of, and without reference to, such sum of 6000*l.*, or any claim in respect thereof, a further sum of 2921*l.* 5*s.* 9*d.*, being the residue of the sum of 8921*l.* 5*s.* 9*d.*, was due to the testator's estate at the date of the fiat from the bankrupts as his executors.

Upon hearing the application to prove the debt, and the opposition which was offered thereto by the assignees, the Commissioner admitted a proof by the petitioner against the joint estate of the bankrupts for 2921*l.* 5*s.* 9*d.*, but rejected the proof which the petitioner desired to make for 6000*l.*, being the residue of the sum of 8921*l.* 5*s.* 9*d.*

From this decision of the Commissioner the present petition was an appeal.

Mr. *Russell* and Mr. *Chandless* in support of the petition.

The *Chief Judge*.—Can the widow be said to have retained the trust funds in her hands, and employed them in the testator's business, when she admitted a

partner, and entrusted him with the partnership assets ? If a testator directs that a particular chattel shall remain in the custody of *A.*, is it an execution of the trust to place it in the custody of *A.* and *B.* ?

1846.  
~  
Ex parte  
BUTTERFIELD.

*Mr. Swanston* for the respondents. The mere circumstance of the widow taking the son into partnership does not render the business less the testator's business, nor is it a parting with the assets. The employment of a person to manage the business as a clerk, with liberty to draw cheques, would not be a breach of trust, if that were found an advantageous mode of carrying on the business. But that would be a stronger case than the present, for there a stranger must be trusted, whereas here the person who assisted the widow was her co-executor, whom the testator himself trusted with the administration of his estate. He referred to *Ex parte Garland* (a), *Ex parte Richardson* (b), *Cutbush v. Cutbush* (c), *Thompson v. Durham* (d), and *Ex parte Thompson* (e).

**The CHIEF JUDGE.**—The facts I take to be these.

The testator was a draper at Royston.

Upon his death his widow, mentioned in the will, continued the trade for a short time, and then she took her co-executor, the testator's son, into partnership with her in the testator's business, the testator never having had a partner.

The sum of 6000*l.*, which the will mentions, was, as I

(a) 10 Ves. 110.

(b) Buck, 202 ; and see *Ex parte Bannerman*, Mont. & Ch. 572.

(c) 1 Beav. 187.

(d) 1 Hare, 375.

(e) 2 Mont. Dea. & De G. 761.

1846.

Ex parte  
BUTTERFIELD.

understand, either received and retained by her, or received and retained by both.

Being so received and retained by her, I understand that, at the commencement of this partnership, it had either not been brought into the trade, or, having been brought into the trade, was there; not lost, not diminished, but safe. So that if she had died or married, or wholly and in every sense discontinued the business, the money was forthcoming.

By the effect of the formation of the partnership all the partnership assets and the business (I collect that state of things to be admitted) came into the joint possession and into the joint power of the two partners, with such power in each as one partner by the law of the country separately has; and I understand that in the same manner they came into the joint possession and joint control of the 6000*l.*, or that which represented the 6000*l.*; if it had been received by the widow before the partnership it was safe, and that all the property including that went into the partnership; if it was received afterwards it was received by the partnership.

I should also say (indeed it follows from what has been already stated, and I understand it to be admitted,) that the partnership extended to the whole of every trade, to the whole of every business that the testator carried on, so that from the time of the formation of the partnership there was not any part of any trade or any part of any business that the testator had carried on that was carried on by the wife alone, or otherwise than by the wife and son jointly.

That, as I understand, being the state of facts, let us read the clause in question.

The testator says, "and I hereby direct and declare that it shall be lawful for my beloved wife to retain in her hands and to use and employ any sum or sums of money, not exceeding 6000*l.* in the whole, in carrying on the trades or businesses in which I may be engaged at my decease, or any part thereof, for and during so long a time as she may think fit, if she shall continue my widow; and I direct that all the rest of my personal estate, except the 6000*l.*, shall be converted into money and laid out in government or real securities in the names of my executors as soon as conveniently may be after my decease; but in case my said wife shall marry again after my decease, then in that case I direct that the said 6000*l.* shall be no longer continued in her hands, but shall be immediately paid in and invested by my executors in government or real securities, at interest, for the benefit of my said wife, and my said wife shall lose by marrying again only the custody and possession of the 6000*l.*, and not any beneficial interest therein."

1846.  
  
 Ex parte  
 BUTTERFIELD.

Now I am of opinion, upon the construction of this will, that the testator intended the trade or business to be carried on by the wife alone.

As soon as she entered into a partnership, which partnership extended to the whole of the trade, and thereby in a sense discontinued the testator's trade, it became the duty of the executors to call in the 6000*l.* immediately as I conceive.

It is admitted that the 6000*l.*, when that partnership began, was not wholly or partially lost, but was entirely safe. The consequence is that, independently of the liability of the two incurred by the joint possession, there was a liability by the breach of trust in which

1846.

*Ex parte*  
BUTTERFIELD.

they both participated, in allowing money which ought to have been invested to remain uninvested on personal security.

Such, at least, is my opinion (a).

(a) An appeal from this decision has been heard before the Lord Chancellor, and is now awaiting his Lordship's decision.

March 30,  
April 1,  
April 27,  
May 2.

The official assignee represents the creditors sufficiently to enable the Court to suspend the advertisement by consent before the choice of creditors' assignees, although the bankruptcy is not disputed.

*Ex parte* POTTS.—In the matter of POTTS.

**THIS** was the petition of the bankrupt to stay the advertisement.

The petitioning creditor consented, and application was made to Sir *George Rose* at the Master's Office (his Honor the Chief Judge being out of town) to make the order. Counsel did not attend, but their briefs were produced.

**Sir GEORGE ROSE.**—This is an application by the bankrupt, who has been adjudged a bankrupt, and admits that he is one, to enlarge the time for advertising the adjudication. The petitioning creditor consents.

I am of opinion that I cannot make the order. Unless the law has been altered by some recent enactment, of which I am not aware, the advertisement of the bankruptcy in the Gazette is the right of all the creditors, and can be suspended only upon the Court being satisfied that the proceedings do not sustain the adjudication, or in other words, that there is no bankruptcy.

Consent cannot supply the want of this requisite; it would be contrary to the policy and principle of the bankrupt law that it should, as it would tend to take the



## CASES IN BANKRUPTCY.

267

assets of the insolvent trader from the administration in bankruptcy, and compel the assents of creditors to arrangements other than those given to them by the law.

1846.

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Ex parte  
Potts.

During all the time that the advertisement is enlarged, no other creditor can apply for a fiat, and the petitioning creditor and the bankrupt have it all their own way. The course of proceedings in these cases is prescribed by an order drawn with much care under the sanction of Lord Eldon.

The fiat must be considered, after adjudication, not as an instrument in the hands of the bankrupt, or of the petitioning creditor, or of any creditors, other than as the process of them all. It must proceed to the choice of assignees, and if then they all consent, and the Commissioner so certifies, it is annulled as a matter of course.

On the next day application was made in the country to his Honor the Chief Judge, and the following Order was made :

April 1.

Upon this petition, and the consent of the petitioning creditor, and the affidavit of the bankrupt, Mr. Stephens and Mr. Edwards with two exhibits, and the bankrupt undertaking to abide by any order which the Court shall think fit to make, let the advertisement be suspended till the 16th instant; but this is not to prevent or delay any proceeding with respect to the estate on the part of the official assignee or the messenger.

The bankrupt then presented a petition to annul the fiat with the consent of all the creditors except two, one for 150*l.* the other for 70*l.*, or for a further suspension of the advertisement.

Mr. Russell supported the petition.

April 27.

1846.

Ex parte  
Potts.

Mr. *Forster* appeared for the petitioning creditor.

The CHIEF JUDGE.—The fiat cannot be annulled unless the two remaining creditors consent, or are paid in full, or unless the full amount of their debts is deposited. I will, to give time, continue the suspension of the advertisement in the Gazette till Thursday at the rising of the Court, and any other creditor is to be at liberty to issue a fiat. In allowing this suspension I am influenced by the circumstance that the estate is vested in the official assignee.

May 2.

On this day the fiat was annulled with the consent of all the creditors.



Ex parte JOHN GRAHAM and WILLIAM TURQUAND.—In the matter of CHARLES GORDON GRAY and others (a).

May 9.

In the case of a defaulting official assignee, the Court ordered that no sum should be paid in respect of monies due to him in any bankruptcy until he had made good all the amounts due from him in other bankruptcies.

THIS was the petition of two of the official assignees of the Court of Bankruptcy, who had been appointed to act in the matters of certain bankruptcies in the place of *James Clark*, an official assignee, who had been removed from his office.

Previously to his removal the Commissioner directed a statement to be made out from his ledgers of the balances appearing thereby to be due from him in respect of his receipts and payments on account of the different bankrupt's estates of which he had acted as official assignee, and such statement was accordingly made out, and the

(a) The petition was intituled in the several matters in which Mr. *Clark* was official assignee.

total balance appearing thereby to be due from him amounted to 8600*l.* and upwards. In some few estates balances appeared due to Mr. *Clark*, and in others no balance appeared due either way.

1846.  
  
 Ex parte  
 GRAHAM  
 and another.

On his appointment as official assignee Mr. *Clark* had entered into the usual bond with six sureties to the amount of 6000*l.*

Under an order of the Court of Review proceedings had been taken upon the bond against the sureties, three of whom proved insolvent. From the other three payments were obtained; but the result was that 4000*l.* of the amount of the defalcation still remained unpaid.

Mr. *Clark* had made an assignment of his estate, including his emoluments as official assignee, to one of his sureties by way of counter security.

The prayer of the present petition was that all such sum and sums of money as the Commissioner should find to be due and owing to Mr. *Clark* from any bankrupt's estate of which he was official assignee, might be retained or received by the petitioners as the official assignees of such estates, and be by them paid into the bank to the account intituled "In the matter of the estates wherein *James Clark*, late official assignee, was in default, being monies recovered from the sureties of the said *James Clark*," or to some other separate account; and that the Commissioner might be authorized and directed to pay and divide, as and when he should think proper, the residue of what should remain of the said cash, after certain payments thereout, to the petitioners, in respect of costs, to and amongst all and every the bankrupt's estates to which Mr. *Clark* stood indebted in any balance or sum of money, rateably and in proportion to the respective balances or sum or sums of money, with

1846.

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Ex parte  
GRAHAM  
and another.

liberty for any party interested therein to apply to the Court as to any residue remaining after the aforesaid payments.

*Mr. Swanston* in support of the petition.

*Mr. Wright* for *Mr. Clark* and *Mr. Bond*, the surety to whom the assignment had been made, submitted to the order of the Court, which was as follows:

**THE CHIEF JUDGE**—Declare (*Mr. Bond* and *Mr. Clark* not opposing) that neither *Mr. Clark* nor *Mr. Bond* can claim any balance or balances due to *Mr. Clark* as official assignee under any bankruptcy or bankruptcies, without making good the balance or balances (if any) due from him as official assignee under any other bankruptcy or bankruptcies.

Refer it to the Commissioner to inquire and ascertain (having regard to this declaration) what is the clear balance (if any) due to or from *Mr. Clark* and *Mr. Bond* respectively or either of them in respect of *Mr. Clark's* various official assigneeships and his transactions thereunder, and in respect of the bond entered into by them; and the Commissioner in taking the account is to have regard to the sum or sums already paid under the bond and to the persons respectively by whom the same has or have been paid; and if in taking such account the Commissioner shall find it necessary to tax any costs, let such taxation take place accordingly.

Let the petition stand over in other respects, and let *Mr. Clark* and his sureties be at liberty to attend the Commissioner under this order, reserving the question as to the costs of their attendance.

Ex parte CHARLES KERRY NICHOLLS.—In the matter of CHARLES KERRY NICHOLLS.

1846.

May 27 and June 17.

THIS was the bankrupt's petition to annul the fiat (which had been sued out by himself) with the consent of the only creditor who had proved.

Where a bankrupt sued out a fiat against himself, and only one creditor proved and assignees were chosen, but there were no assets, and the office fees of 10*l.* and 20*l.* had not been paid, the Court refused to dispense with the usual certificate of the Commissioner on an application to annul with the consent of the creditor.

The Commissioner (Mr. Fane) declined giving the usual certificate of the bankruptcy, surrender and choice of assignees, until the office fees of 10*l.* and 20*l.* were paid.

The fiat issued on the 2nd of September, 1844, and creditors' assignees had been chosen, but there were no assets, and the petitioner deposed that he had no means of paying the fees.

Mr Wright, in support of the petition, cited Ex parte Diamond (a).

The CHIEF JUDGE.—I have never knowingly done what is here asked, where creditors' assignees have been chosen: I do not say I never will. In a late case (b) I requested Mr. Commissioner Holroyd to make a communication to me. It was made, and the consequence was that the fees were paid. I will here request Mr. Commissioner Fane to state to me whether this is a fit case in which to make the order without payment of the fees.

On this day His Honor said he had received a communication from Mr. Commissioner Fane, and was of opinion that the usual course ought not to be departed from in this case.

June 17.

(a) Ante, p. 143; and see Ex parte Davis, ante, p. 267.

(b) Ex parte Davis, ante, p. 267

1846.



Ex parte JOSHUA HALL.—In the matter of JOSEPH BLACKBURN and BENJAMIN BLACKBURN.

June 2.

Where one of the bankrupts died before the adjudication under a joint fiat, the fiat was ordered to be amended by omitting his name.

THIS was a petition to annul a joint fiat, one of the bankrupts having died before the adjudication. The Commissioner declined opening the fiat.

Mr. *Radiger* in support of the petition referred to *Ex parte Norris (a)*.

The CHIEF JUDGE.—If after declaration in an action one of several defendants dies, the action proceeds, a suggestion, I believe, being entered on the record. Let it be understood that I do not decide that the present fiat cannot be proceeded with; but as the learned Commissioner entertains doubts, the fiat may be annulled, and a separate fiat may issue, or the existing fiat may be amended.

The ORDER was, that upon the petitioner filing new docket papers in the office of the Lord Chancellor's Secretary of Bankrupts, the fiat should be amended by striking out the name of *Joseph Blackburn*, and the date of the fiat should be altered to agree with such new docket papers, if the Lord Chancellor should think fit; and that the fiat should be taken off the files of the Court of Bankruptcy, and transmitted to the office of the Secretary of Bankrupts for that purpose. The costs were to be paid out of the estate of *Benjamin Blackburn*, in the event of his being adjudicated a bankrupt under the fiat

(a) Mont. & Chit. 157.



1846.

Ex parte WILLIAM CHEESBOROUGH and others.

—In the matter of JOSEPH FEARNLEY.

June 10.

THIS was the petition of twenty-three creditors to change the venue of the fiat from London to Leeds. The fiat was sued out by the bankrupt himself, who carried on business as a woolstapler at Bradford.

Bankrupt allowed his expenses arising from changing the venue of the fiat after adjudication.

The fiat had been opened, but no assignees had been chosen, the choice having been adjourned to abide the result of the petition.

The affidavit in support of the application stated that the whole amount of the debts due from the bankrupt, according to the account rendered by him to his creditors, amounted to 10,329*l.*, of which 662*l.* was due to the petitioners.

The number of creditors was forty, of whom twenty-eight resided at Bradford, and the debts due to the latter creditors amounted to 7500*l.*

Mr. *Swanston* in support of the petition.

Mr. *Willcock* for the bankrupt did not oppose, but asked that the bankrupt's expenses owing to the change of venue might be provided for. There was no general rule as to this when the fiat had been opened.

The CHIEF JUDGE.—Let the fiat be transferred to Leeds, and let the bankrupt be allowed his expenses in the same manner as if the transfer had taken place before the adjudication (*a*).

(*a*) See *Anon.* Mont. & Ch. 142.

1846.



June 20.

Affidavit of  
debt filed under  
1 & 2 Vict. c.  
110, s. 8, order-  
ed to be taken  
off the file with  
the creditor's  
consent.

## ANONYMOUS.

MR. *GREENE* applied for leave to take off the file an affidavit of debt which had been made for the purpose of being the foundation of an act of bankruptcy under the provisions of 1 & 2 Vict. c. 110, s. 8. The debtor had been personally served with a copy of the affidavit and with the proper notice in writing requiring immediate payment; but owing to an impression that the 1 & 2 Vict. c. 110, s. 8, was repealed by 5 & 6 Vict. c. 122, no steps were taken by the debtor until an act of bankruptcy had been committed by his default in complying with the provisions of the former act. The debt had since been satisfied, but as it was of the greatest importance to the debtor's credit that no trace should remain of the proceedings the present application was made on his behalf.

Mr. *Glasse* appeared for the creditor and consented.

The COURT ordered that the affidavit should be taken off the files of the Court of Bankruptcy, and delivered to the debtor's solicitor (a solicitor of the Court) to be cancelled or destroyed if the debtor should think fit.





1846.

In the matter of THE FORTH MARINE INSURANCE COMPANY.

and

In the matter of 7 & 8 VICT. c. 111.

*Before the Master of the Rolls.*

*June 29 and Sept. 23.*

**THIS** was the petition of the assignees of a joint stock company, against which a fiat had issued under the provisions of the act 7 & 8 *Vict. c. 111*.

Form of Order in Chancery under the act 7 & 8 *Vict. c. 111*, s. 20, for winding up the affairs of a bankrupt joint stock company.

The petition was presented to the Master of the Rolls under the 20th section of the act for directions as to winding up the affairs of the company.

The petition stated an act of parliament made and passed in the fifth and sixth years of the reign of her present Majesty, intituled "An Act to enable the Forth Marine Insurance Company to sue and be sued, and for other purposes."

The petition then went on to state that by the contract of copartnery of the company it was declared that the capital stock should be 100,000*l.*, divided into 4000 shares of 25*l.* each; and the partners became bound to contribute, advance and pay the amount of their respective shares as follows, namely, ten per cent. on the amount at the commencement of the business, and such further proportions of their said shares, at such periods and by such instalments, and to such person or persons as the directors for the time being should appoint.

That a very large number of persons subscribed for and took shares in the company, and executed the contract of copartnery, and that the company commenced their trade or business of underwriters first at Leith, and afterwards in the city of London.

1846.

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In the matter of  
THE FORTH  
MARINE  
INSURANCE  
COMPANY  
and  
7 & 8 VICT.  
c. 111.

That the trade or business commenced on the 15th day of May, 1839, and was carried on at Leith and in London until the 2nd day of July, 1845, when the company was duly found and declared bankrupt, as was thereafter more particularly mentioned.

That calls amounting altogether to 25*l.* per share on the several shares of the company were from time to time duly made by the directors of the company, and the calls were duly paid by the majority of the said shareholders, although some parts thereof were left in arrear by some of such shareholders and had never yet been paid; but the business of the said company was very unfortunate in its results, and great losses were sustained by the company, and in consequence thereof further sums beyond the amount of the said calls were contributed by many though not all of the shareholders of the said company, and the further sums so contributed were insufficient to meet the debts and liabilities of the company; and that accordingly on the 2nd of July, 1845, a fiat in bankruptcy was duly awarded and issued against the said company on the petition of certain creditors of the company, under which the company was duly found and declared bankrupt, pursuant to the provisions of the act of the seventh and eighth years of the reign of her present Majesty.

After stating the appointment of an official and of creditors' assignees, the petition stated an order of the Commissioner acting in the prosecution of the fiat, dated the 1st day of August, 1845, whereby it was ordered that two of the directors should prepare the balance sheet and accounts of the company in such form as was usual in matters of bankruptcy, and should subscribe such balance sheet and accounts and file the same, and deliver

a copy thereof to the official assignee ten days at least before the 22nd day of August then instant, or such other day as the Court should appoint for the last examination under the fiat against the said company.

That these directors prepared the balance sheet accordingly, and delivered a copy thereof to the official assignee within the time limited by the said order, and that on the 7th day of February, 1846, (until which day the passing of their last examination was adjourned), they passed their last examination on behalf of the said company under the fiat.

That the creditors, whose debts were already proved against the said estate under the said fiat, amounted to the sum of 28,187*l.* 17*s.* 3*d.*, or thereabouts, and that there were outstanding claims and risks against the said company to a considerable amount.

The petition then set out a report of the official assignee to the Commissioner, dated the 7th of February, 1846, and an order of the Court of Bankruptcy dated the 17th of March, 1846, whereby it was ordered and directed that pursuant to the authority given to the said Court by the act, the present petitioners should forthwith apply to the Master of the Rolls by petition in a summary way, praying that all such orders and directions might be given as should be necessary for the final winding up and settling the affairs of the said company, and to compel a just contribution from all the members of the said company towards the full payment of all the debts and liabilities of the said company, and of the costs of winding up and finally settling the affairs of such company.

The petition concluded by stating that the petitioners were advised and humbly submitted that, in order duly

1846.

In the matter of  
THE FORTH  
MARINE  
INSURANCE  
COMPANY  
and  
7 & 8 VIOT.  
c. 111.

1846.  
  
 In the matter of  
 THE FORTH  
 MARINE  
 INSURANCE  
 COMPANY  
 and  
 7 & 8 VICT.  
 c. 111.

to wind up and settle the affairs of the company, and to compel such just contribution as aforesaid, it would be necessary, or at all events desirable, that the orders and directions to be made and given pursuant to the said act should contain in detail directions and provisions for ascertaining the total number of shares in the said company, and of the shareholders therein; and of the persons who then constituted such shareholders, and of the number of shares held by each shareholder; and also for ascertaining the amount due from each shareholder, to make good the amount required to satisfy the outstanding debts and liabilities of the company, having regard to the extent and proportions of each shareholder's interest in the said company, and to the several payments previously made by each shareholder respectively on account of the company.

The prayer was, that all such orders and directions might be given as should be necessary for the final winding up and settling the affairs of the company, and to compel a just contribution from all the members thereof towards the full payment of all its debts and liabilities and of the costs of winding up and finally settling the affairs of the company, and that it might be referred to one of the Masters to take all such accounts and make all such inquiries as should be required for the purpose of ascertaining what sum of money in the whole, or what sum or sums of money from time to time on account, would (having regard to the deed of settlement of the said company, and the calls, contributions, debts or demands actually paid by the several and respective members thereof, and also having regard to the proceedings in the Court of Bankruptcy) be necessary and proper to be raised by calls or contributions from the respective members of the said com-

pany for the payment and satisfaction of all the debts and liabilities of such company, and also of all the costs of winding up and settling the affairs of the company.

1846.

In the matter of  
THE FORTH  
MARINE  
INSURANCE  
COMPANY  
and  
7 & 8 VICT.  
c. 111.

Mr. *Rolt* appeared in support of the petition.

The MASTER OF THE ROLLS said that as it was the first case under the act, his Lordship would take time to frame such an order as might be proper.

Afterwards the order was made according to the following minutes.

Refer it to the Master of this Court in rotation to inquire and state to the Court what sum of money in the whole, and what sums of money or proportionate parts of the whole, or what sum or sums of money from time to time on account, will (having regard to the deed of settlement of the said company, and the calls, contributions, debts or demands actually paid by the several and respective members thereof, and also having regard to any proceedings in the Court of Bankruptcy or any District Court of Bankruptcy) be necessary and proper to be raised by calls or contributions from the respective members of the said company for the payment and satisfaction of all the debts and liabilities of the said company, and also of all the costs of winding up and settling the affairs of the said company.

September 23.

And in order thereto, the parties are to produce before the said Master, upon oath, all deeds, books, papers and writings in their custody or power relating to the matters aforesaid, and are to be examined upon interrogatories as the Master shall direct.

And the said Master is to cause a list to be made of the names of the several persons whom he shall find to be shareholders of or in the said company, and of the

1846.

In the matter of  
THE FORTH  
MARINE  
INSURANCE  
COMPANY  
and  
7 & 8 VICT.  
c. 111.

number of shares held by or ascribed or attributed to them respectively, and he is to cause an advertizement to be published in the London Gazette, and such other public papers as he shall think proper, setting forth a copy of the said list and giving notice that the shareholders therein named are, if they think fit, to come in before him and dispute their liability in respect of their shares respectively; and the said Master is to fix a peremptory day for that purpose, and that in default of their coming in to dispute their liability as aforesaid by the time so to be limited, each of such shareholders will be held liable in respect of such shares respectively, and a copy of such notice is also to be served upon each of the said shareholders.

And in case any of them shall come in before the said Master to dispute their liability as aforesaid, the said Master is to appoint a time for the consideration thereof, and for such shareholders respectively to show cause against their names being included in the said list, and the said Master is to be at liberty to enlarge such time as he shall see fit.

And he is also to be at liberty, after the expiration of the time for showing such cause, to make a separate report, or separate reports, from time to time, as to any of the persons whom he shall find to be shareholders, and of the shares attributable to them respectively, and of the amount payable by any of them.

And the said Master is also to be at liberty to state any circumstances relating to the matters aforesaid specially as he shall think fit.

And in case of any difficulty arising in the prosecution of this order, the Master is to certify the same to the Court, and thereupon such further order shall be made as the case may require.

And any of the said shareholders are to be at liberty to except to the Master's general report, or to any separate report which he may make in pursuance of this order.

And they and the petitioners are to be at liberty to apply to this Court as they may be advised, whereupon such further order shall be made as shall be just.

1846.  
In the matter of  
THE FORTH  
MARINE  
INSURANCE  
COMPANY,  
and  
7 & 8 VICT.  
c. 111.

Ex parte THOMAS STURTON, JOHN JOHNSON,  
EDWARD BLITHE VISE, EDWARD KEY, and  
JOHN WEST.—In the matter of THOMAS PUL-  
VERTOFT.

THE petitioners claimed to be bond creditors to the amount of 1103*l.*, and they prayed that a dividend which had been declared might be stayed and that they might be at liberty to go in and prove their debt. The fiat issued in September, 1835, but no dividend was declared till April 22nd, 1846.

It appeared that the bankrupt and a Mr. *Calthrop* had in 1824 executed the bond in question, and that on November 3d, 1835, a fiat issued against *Calthrop*, under which the petitioners proved on April 14th, 1836, and afterwards received a dividend of 1*s.* 2*d.* in the pound on the debt.

On the same day a dividend of 1*s.* 2*d.* in the pound was declared under the fiat against *Pulvertoft*, but none of the petitioners were aware or had any notice that a meeting was to be held for the purpose of declaring a dividend under the latter fiat until June 18th, and they had not therefore proved their debt under it. They first heard of it from the official assignee, to whom they applied for their dividend under the other fiat.

Lincoln's Inn,  
July 1.

Dividend  
stayed to give  
opportunity of  
proving to cre-  
ditors who had  
delayed proving  
for eleven  
years, no  
dividend having  
been declared  
for upwards of  
ten years after  
the fiat issued.

1846.

Ex parte  
Swanston  
and others.

Mr. *Russell* and Mr. *Chapman Barber* in support of the petition.

Mr. *Swanston* for the assignees. The petitioners have shown no title to the indulgence which they seek. They have not explained why they have never proved during the whole eleven years which have elapsed since the fiat issued. In *Ex parte Brees* (a) the Court refused to stay a dividend at the instance of a creditor whose laches had been much less.

The CHIEF JUDGE.—The petitioners have been guilty of great delay, but the question is whether they are to forfeit a large sum for it. I think that they may be allowed to prove, and to have the dividend stayed on the usual terms.

Ordered accordingly.

(a) 3 D. & C. 283.

Ex parte PARSONS.—In the matter of FIDGEON.

July 1.

Where a bankrupt sued out a fiat against himself, and creditors' assignees were chosen, his solicitor was ordered to be paid the amount of his bill of costs up to the choice out of the first monies received by the assignees.

THE fiat in this case was sued out by the bankrupt himself under the act 7 & 8 Vict. c. 96, s. 41. Assignees had been chosen and had appointed a solicitor of their own, and this was the petition of the bankrupt's solicitor to be paid out of the first monies in the hands of the assignees the balance due in respect of his bill of costs under the 6 Geo. 4, c. 16, s. 14.

Mr. *Taylor* in support of the petition. The new act expressly provides that after the adjudication all proceedings shall be prosecuted and carried on in like



manner as if the fiat had been issued and adjudicated upon on the petition of a creditor of the bankrupt. Now one of the first proceedings under a fiat issued on the petition of a creditor is to order the payment of the bill of costs of the solicitor who sues out the fiat, and therefore the same course must according to the terms of the act be pursued here. The point has been expressly raised and determined before a Subdivision Court of the London Commissioners, and was in effect decided by this Court in *Ex parte Paterson* (a), where your Honor directed payment of the bill of the bankrupt's solicitor although no assignees had been chosen.

1846.  
~~~~~  
Ex parte  
Parsons.

Mr. *Swanston* for the assignees.

The CHIEF JUDGE.—In this case creditors have come in under the fiat and have chosen assignees, and, without laying down any universal rule on the subject, I think it right that the solicitor's bill should be paid in this particular case.

(a) *Ante*, p. 158.

Ex parte BOWNER.—In the matter of PULVERTOFT.

A PETITION under this bankruptcy to stay the dividend to let the petitioners prove and participate in it is reported *ante*, p. 341. Under this order a sitting was held for the petitioners to prove their debts, when other creditors also appeared and tendered proofs, which the Commissioner signified his intention of admitting. The assign-

July 15.  
Opening dividend at instance of one creditor lets in others to prove.

1846.

Ex parte  
BOWNER.

nees now asked the Court to intimate its opinion that this course ought not to be taken.

Mr. *Swanston* for the assignees contended that the grounds on which the former petitioners were admitted to prove were peculiar to them, and that other creditors who made out no claim to a similar indulgence ought not to be let in to prove.

The CHIEF JUDGE, after consulting Mr. *Ayrton*, who stated it to be the practice to let in other creditors under such circumstances, declined interfering.

Ex parte WILLIAM RALPH BUCHANAN.—In the matter of JOHN PEART BIRLEY.

*Lincoln's Inn,*  
*July 19.*

Under the bankrupt's own fiat, there being no probability of any choice of creditors' assignees, and the office fees of 10*l.* and 20*l.* having been paid to the Accountant General: *Held*, that they might be applied in payment of the bill of costs of the bankrupt's solicitor.

THIS was the petition of the bankrupt's solicitor for payment of his bill of costs, and as against the office fees of 10*l.* and 20*l.* The fiat issued on December 12th, 1841, on the bankrupt's own petition. Meetings for the choice of assignees had been held on the 28th of February and the 28th of March, 1845, and were adjourned without any assignees having been chosen, and at the latter meeting the choice was adjourned *sine die*.

On the same day the bankrupt passed his last examination, and on May 24th he obtained his certificate.

Out of the assets, amounting to 61*l.* 5*s.* 5*d.*, the official assignee had paid expenses amounting to 20*l.*, and had also paid into the Bank to the account of the Accountant General in bankruptcy 30*l.*, for the office fees of 10*l.* and 20*l.*

It was sworn that no creditors' assignees or assignee had been or were or was likely to be at any time chosen.

Mr. *Bacon* in support of the petition referred to *Ex parte Paterson* (a) and *Ex parte Parsons* (b).

1846.

Ex parte  
BUCHANAN.

The CHIEF JUDGE said that in cases like this all the machinery of the bankrupt law was put in operation without any benefit to the creditors. The solicitor and the crown divided the prize. The former had here the preferable title.

(a) *Ante*, p. 158.

(b) *Ante*, p. 342.

Ex parte STAMP.—In the matter of SPENCE,  
and

Ex parte JONES.—In the same matter.

THERE were two fiats, a joint fiat and a separate fiat, in the case, and there were two petitions, one to annul the separate fiat and in favour of the joint fiat; and the other a cross petition to annul the joint fiat.

July 20.  
*Semble*, that a lunatic cannot commit an act of bankruptcy by omitting to pay or give security.

On the 28th of July, 1845, Sir *George Rose* made an order dismissing both petitions. This was a petition of rehearing. It appeared that one of the bankrupts was *non compos mentis*, and that the act of bankruptcy relied upon was the failure to pay or secure a debt according to the act 5 & 6 *Vict. c. 122*, s. 13.

Mr. *Anderdon*, in support of the petition to annul the joint fiat, contended that a lunatic could not be a bankrupt.

Mr. *Russell* and Mr. *Bagshawe*, for the assignees and the joint fiat, contended that lunatics were liable to the bankrupt laws, not being expressly excluded.

1846.

Ex parte  
STAMP.  
Ex parte  
JONES.

Mr. *Younge* for the petitioning creditor.

[A witness was examined *visà voce* in Court as to the state of mind of the bankrupt.]

The CHIEF JUDGE.—The evidence makes me doubt the validity of the joint fiat. The legislature must have intended service on a person who could give a bond or dispute the debt, which a person *fatuous* or *delirious* cannot do. Can such a person commit an act of bankruptcy by omitting to give a bond? I think the validity of the joint fiat open to most serious doubts, and that it would be an act of the greatest imprudence to annul the separate fiat. I am of opinion that Sir *G. Rose's* order both as to what it did and what it omitted is correct. Dismiss the petition of *L. H. Stamp* with costs. Consolidate the two fiats. Let the estate under each fiat be without prejudice to any question as to joint or separate estate administered by the assignees under the separate fiat.

Ex parte JOHN PHILPOTT.—In the matter of  
JOHN RICHARD MISKIN.

Lincoln's Inn,  
July 22.

A trust deed,  
which could not  
have been im-  
peached under  
a fiat sued out  
by any creditor,  
held incapable  
of being im-  
peached under  
the bankrupt's  
own fiat.

THIS was the petition of the trustees of a composition deed, to whom the bankrupt had assigned all his property upon trust for his creditors, praying for a declaration that they were entitled to hold the property as against the assignees, and that the assignees might deliver up certain account books.

The trust deed bore date and was executed on the 7th of May, 1846, it was made between the bankrupt, who was a grocer at Chatham, of the first part, the petitioners

*Answered & Dismissed 24th. Sep. 215 4/11  
24th. Sep. 215 4/11 997 4/11 5th. Sep. 215 4/11  
4/11 215 4/11 757*

of the second part, and scheduled creditors of the third part, and it purported to assign to the petitioners all the stock in trade, goods, wares and merchandize, household furniture, plate, linen, china, books of account, book debts, sums of money, securities, and all other the personal estate and effects whatsoever and wheresoever of the bankrupt, upon trust to pay the proceeds of the assigned property rateably among all the creditors.

1846.  
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Ex parte  
PHILPOTT.

On the 3d of June, 1846, the bankrupt, being then a prisoner in execution for debt, filed a declaration of insolvency, and on the 4th of June he sued out a fiat against himself under the act 7 & 8 Vict. c. 96 s. 41 (a), and a creditors' assignee had been chosen, who had possessed himself of the bankrupt's books and required the petitioners to account for their receipts under the trust deed.

It was admitted at the bar that there was no creditor who could have sued out a fiat grounded upon the trust deed as an act of bankruptcy, and all parties, to save expense, were desirous of having the question of the validity of the assignment determined by the Court.

Mr. *Chandler* in support of the petition. To avoid a trust deed by the operation of a fiat, it was always held necessary that the fiat should be supported by a good petitioning creditor's debt incurred not anterior to the execution of the deed, nor could the deed be set aside under a fiat sued out by a creditor who was party to the deed. *Tope v. Hockin* (b), *Burbidge v. Watson* (c). Now under the new act 7 & 8 Vict. c. 96, s. 41, it is provided that where a fiat is sued out by a bankrupt himself, all proceedings after the adjudication shall be prosecuted and carried on in the same manner as if the

(a) See *ante*, p. 257 n. (a). (b) 7 B. & C. 101. (c) 4 Car. & P. 171.

1846.  
Ex parte  
PHILPOTT.

fiat had been sued out by a creditor. But if the fiat had been sued out by a creditor, party to the trust deed, the deed could not be impeached. How then can it be impeached under a fiat sued out by the bankrupt, party to the deed? The principle is, that the deed shall not be impeached under a fiat sued out by a party to the instrument, and it cannot make any difference, and the act provides that it shall make no difference, by whom the fiat is sued out, whether creditor or bankrupt, as to the proceedings under it. It may be added too that the greatest injustice would result from holding the contrary and allowing a bankrupt to avoid his own act.

Mr. *Swanston* for the assignees. In *Simpson v. Sikes* (a) the Court of Queen's Bench held that a trust deed might be avoided under a commission, although the bankrupt has executed the deed for the very purpose of its being an act of bankruptcy. The objection was not to the bankrupt being party to the deed, but to the petitioning creditor proceeding against the bankrupt after agreeing not to do so by the terms of the composition contract. Authorities as to the time when the petitioning creditor's debt must have been incurred can have no application to the case of a fiat, which by the act of parliament requires no petitioning creditor's debt whatever to support it.

The CHIEF JUDGE.—It is not necessary to say, and I abstain from giving any opinion, how the case would have been decided, if, when the fiat issued, there had been a creditor, or any number of creditors, capable of suing out a fiat grounded on the execution of the trust deed as an

(a) 6 Mau. & Sel. 295,

act of bankruptcy. Here there was no creditor nor any number of creditors who could have sued out such a fiat, and I must hold that the deed is valid as against the fiat, although sued out by the bankrupt himself.

1846.

Ex parte  
PHILPOTT.

Ex parte JOHN GOVER.—In re WILLIAM HUMPHRYES.

Lincoln's Inn,  
July 27  
and  
August 1.

THIS was a petition by a creditor who had proved a debt under the fiat, praying that *Charles Colwell*, one of the creditors' assignees, might be ordered to complete a contract made by him for the purchase of a leasehold tenement, and the fixtures and fittings thereof, part of the property of the bankrupt, or that the premises might be again put up to sale, and in case less should be produced by such resale than the purchase money of the tenement and the value of the fixtures and fittings, and the rent, taxes and outgoings accrued in respect of the said premises since the day of sale, then that *Charles Colwell* might be ordered to make good and pay the same; and that the monies to be paid by the said *Charles Colwell*, on completing his purchase, or the monies to be produced by a resale, and to be made good by *Colwell*, might, without prejudice to the right of the mortgagees of the property, be paid to the official assignee, and that *Colwell* might be ordered to pay the costs of the petition.

Where an assignee bought in without an order, he was ordered to make good the loss occasioned by a resale.

The leasehold tenement in question was an hotel, held for a term, whereof twenty-five years were unexpired, at a rent of £201. a year; it was mortgaged to one *John Stratford Rodney* to secure 400*l.* and interest, and

1846.

Ex parte  
Gover.

equitably mortgaged to one *John Hatherley* to secure 100*l.* and interest.

On the 11th of February, 1846, the assignees, with the consent of the mortgagees, put up the premises for sale by auction, subject to conditions of sale, whereby it was provided that the fixtures and fittings should be taken by the purchaser at a valuation, and that 20*l.* per cent. should be paid by way of deposit. No provision was made concerning a reserved bidding.

One *John Jessop* bid 600*l.*, upon which *Colwell* bid 650*l.*, and thereupon *Hatherley*, the mortgagee, and who was a solicitor, warned *Colwell* that he had no right to bid without having obtained the authority of the Court of Bankruptcy so to do, and that if he bid again he would be held to his bidding. Then one *Charles Bowden* (head waiter at the hotel), bid 660*l.*, and thereupon *Colwell* bid 670*l.*, and at that price the premises were knocked down to him.

*Colwell* was under the impression that the property was worth more than had been offered for it, and that he was acting for the benefit of the creditors in bidding, and he meant only to buy in the premises; and the auctioneer, according to that view of the case, did not require *Colwell* to sign any contract or to pay any deposit. *Colwell* also deposed that he believed that *Bowden* was not of ability to complete the purchase, if the premises had been knocked down to him.

Mr. *Shapter*, for the petitioner, cited *Ex parte Lewis(a)* and *Ex parte Tomkins(b)*.

(a) 1 G. &amp; J. 69.

(b) 2 Sugd. V. &amp; P. App. No. 12.



Mr. *Foster*, for the mortgagee, referred to *Ex parte Cuddon* (a).

1846.

Ex parte  
GOVER.

Mr. *Swanston* and Mr. *Rogers*, for *Colwell*, objected that the official assignee, and one *Hurwitz*, the other creditors' assignee, were not served with the petition.

The petition was ordered to stand over to serve the official assignee and *Hurwitz* with the petition.

The matter coming on again after the official assignee and *Hurwitz* had been served with the petition, evidence was adduced of the solvency of *Bowden*, and of the fact that the petitioner had soon after the sale by auction, and also subsequently, been desirous of presenting the petition, but that he had been prevented so doing by the solicitors of the assignees representing that offers for purchase of the premises were from time to time made, and that *Bowden* allowed the matter to stand over without prejudice to *Colwell's* liability; *Colwell* also filed an affidavit to the effect that he himself was not of ability to complete the purchase.

August 1.

The CHIEF JUDGE inquired if *Colwell* would consent to a resale, and his counsel replying in the affirmative, the Court ordered a resale by *Colwell's* consent, with a declaration that he was liable to make good any loss to arise thereby. As to all other matters, the petition was ordered to stand over.

(a) 3 Mont. Dea. & De G. 302.

1846.



Ex parte THOMAS SEDDON KELSALL, WILLIAM STRETTTEL KELSALL, RAMGOPAUL GHOSE, and JAMES KNIGHT HERON.—In the matter of ALEXANDER BEATTIE and FRANCIS MACNAGHTEN.

August 1.

London sub-mortgagees of shipments at Ceylon and Hong Kong send thither, directed to the parties in possession, notices of their security by the next direct mail, there being another and earlier mail by a different route, by which the notices might possibly have sooner reached their destination. Before, however, this could have taken place by either mode of transmission, the submortgagors became bankrupt. Held, that the notice was sufficient to take the goods out of their reputed ownership.

A man may give a valid security on merchandize at sea belonging to him, although at the time he is ignorant of the particulars of which it consists.

THIS was the petition of submortgagees of certain shipments to have effect given to their security, the validity of which was disputed by the assignees on the ground that the earliest possible notice of it had not been given to the parties in possession of the shipments, the bankruptcy having occurred before any such notice could by possibility have reached its destination.

The petitioners' security was effected by an indenture dated the 1st of May, 1846, and made between the bankrupts, therein described as merchants and copartners, carrying on business in the city of London under the firm of *Beattie & Co.*, of the first part, and the petitioner, *Thomas Seddon Kelsall*, of the second part, and after reciting that the bankrupts had advanced and paid to or on account of one *Stephen Vertue* large sums of money on the security of various consignments or shipments of goods and merchandizes made by him through the bankrupts to a firm of *Vertue and Layard* in Ceylon, and to a firm of *Blenkin, Rawson & Co.* of Hong Kong, in China; and that, on the shipment of the said goods and merchandize to the said firms of *Vertue and Layard*, and *Blenkin, Rawson & Co.*, those firms were respectively instructed by the said *Stephen Vertue* to hold the same goods and merchandize to the order and disposal of the bankrupts, and to remit to them direct the net proceeds of the sales thereof, to satisfy their lien thereon

in respect of their advances as aforesaid; and reciting that the style or firm of the said house at Ceylon was, at the time of the date of the said indenture, *H. L. Layard & Co.*, and that merchandizes comprised in the shipments had been transferred and delivered by them in compliance with the directions of the bankrupts in that behalf to a firm of *Armitage, Scott & Co.*, of Ceylon aforesaid, subject to the order and disposal of the bankrupts; and reciting that the bankrupts had applied to the petitioners for a loan of 15,000*l.*, which they had accordingly made upon the security thereafter contained; the deed witnessed, that in consideration of the sum of 15,000*l.*, paid by the petitioners to the bankrupts at or immediately before the execution of the deed, the bankrupts granted, bargained and sold unto the petitioner *Thomas Seddon Kelsall*, his executors, administrators and assigns, all and every the same sums of money then due or thereafter to become due, either for principal or interest, by virtue or in respect of the advances made by the bankrupts to *Stephen Vertue* on the security of the goods, wares and merchandize shipped or consigned by the said *Stephen Vertue* to the said firms of *Vertue and Layard* of Ceylon, and *Blenkin, Rawson & Co.* of Hong Kong as aforesaid, and also all and every the goods, wares and merchandize, or so much or such part of the same goods, wares and merchandize as then remained unsold in the hands of the said firm of *H. L. Layard & Co.* and *Blenkin, Rawson & Co.*, at Ceylon and Hong Kong aforesaid, and all and every bonds, bills, notes, monies and securities for money of whatever description, being the proceeds of sales made or to be made of the said goods and merchandize so consigned or shipped as aforesaid, or any part or parts thereof, then in the cus-

1846.

Ex parte  
KELSALL  
and others.

1846.

Ex parte  
Kelsall  
and others.

today, possession or power of the said last-mentioned firms at Ceylon and Hong Kong aforesaid, or any of them, or which had been sent or remitted by them, or any of them, to the bankrupts, or to any other person or persons by their or any of their directions, and which might then be in transitu; and also all produce purchased with the proceeds of any such sale or sales as aforesaid, and which might then be in the custody, possession or power of the last-mentioned firms, or any of them, or which might have been shipped or forwarded by them, or any or either of them, to the bankrupts, or to any other person or persons by their or any of their directions, and which might then be in transitu, together with all and every invoices, accounts, account warrants, account sales, bills and bills of lading, letters, memorandums and writings whatsoever in the custody, possession or power of the said bankrupts, or any of them, in anywise relating to the several goods and merchandize and premises thereby assigned, or any part thereof, subject to redemption on payment to the petitioner *Thomas Seddon Kelsall*, his executors, administrators or assigns, the sum of 15,000*l.*, and also all such further sums of money which might be advanced by *Thomas Seddon Kelsall* to the bankrupts (not exceeding in the whole the sum of 25,000*l.*) with interest.

The bankrupts, at the time of the execution by them of the indenture, wrote, in the name of the partnership firm, at the petitioner's request, three letters, dated May 1st, 1846, giving notice of the assignment, addressed respectively to the firms at Ceylon and Hong Kong, and gave the letters to the petitioners to be forwarded.

The petitioners despatched these letters by a mail, which left on the 24th of May, but it appeared that there

was another mail which left on the 4th of May, and the question was, whether the latter ought not to have been the bearer of the letters.

The fiat issued on the 21st of May, before the letters could by any conveyance have reached either Hong Kong or Ceylon.

In support of the petition, one of the directors of the Peninsular and Oriental Steam Navigation deposed, that there was only one direct and regular mail from England to Ceylon and Hong Kong, which took its departure in every month in two portions; one proceeded on the 20th from Southampton in the vessels of the company, and the other on the 24th (unless such 24th day should fall on Sunday, and then on Monday, the 25th) of every month; the latter through France, by way of Marseilles; the former portion consisting of heavy letters and despatches, and the latter of letters, bills of exchange, and other mercantile documents of a lighter nature; both, however, constituting in fact but one mail, which was finally united and made up at Malta, and was thence forwarded to its ultimate destination. The deponent stated that the average length of passage of the mail from England to Ceylon was 42 days, and from England to Hong Kong 54 days; and that letters transmitted from England to Ceylon by the mails, by the way of Southampton on the 20th, and by way of Marseilles on Monday the 25th of May, in this present year, would in ordinary course, and according to the average passage, be delivered in Ceylon in the early part of July, and that letters transmitted by the same mail to Hong Kong would in like manner be delivered there about the third week in July.

With respect to the mail on the 3rd, the deponent

1846.

Ex parte  
KELSALE  
and others.

1846.

Ex parte  
KELSALE  
and others.

stated that a mail from England to Bombay was made up and transmitted on the 3rd of every month in the vessels of the same company by way of Southampton, and on the 6th or 7th of every month through France by way of Marseilles, and that letters from Ceylon to Hong Kong are forwarded by this mail, if specially addressed for that purpose, and that on the arrival of the mail at Bombay, letters despatched thereby for Hong Kong were forwarded thence by dawk (or foot post) to Calcutta, and thence to their final destination by the first conveyance which might happen to present itself; and that letters despatched by the mail for Ceylon were, on the arrival thereof at Bombay, forwarded from thence to Ceylon by a steam vessel, which plied during certain months of the year between Bombay and Colombo aforesaid, but that the running of the said last mentioned steam vessel was altogether discontinued during the monsoon, and that the mode of transit and communication between England and Ceylon and Hong Kong by the Bombay mail of the 3rd and 6th or 7th of every month was extremely uncertain and irregular, and that the usual and ordinary and the only certain mode of communication with those places respectively was by the regular and direct mail of the 20th and 24th or 25th of each month.

The deponent added that from his knowledge and experience on this subject, it was his judgment and belief that letters from Ceylon and Hong Kong, despatched by the regular mail on Monday, the 25th day of May last past, would reach their respective destinations earlier than if they had been despatched by the Bombay mail of the 3rd of May, inasmuch as the steam vessel discontinued running between Bombay and Co-

lombo from about the second week in May till about the second week in August, owing to the monsoon which uniformly prevailed during that interval, and that the dawk between Bombay and Calcutta would also during the same period be extremely uncertain, owing to the heavy periodical rains then usually prevalent.

In opposition to the petition, one of the bankrupts deposed, that under ordinary circumstances the mail despatched on the 3rd and 7th days of the month would, even if carried by dawk from Bombay, reach Ceylon four days before the mail despatched on the 20th and 24th days of the month, and if carried by steamer from Bombay under ordinary circumstances would reach Ceylon twelve days before the last mentioned mail, and that it would be a most unusual occurrence for the mail despatched on the 20th and 24th days of the month to reach Ceylon before the mail despatched on the 3rd and 7th days of the month, and that so far as deponent was aware, no such occurrence had ever taken place.

The deponent further stated that it was the practice of the bankrupts' firm, and of other merchants in London, to despatch letters to their correspondents at Ceylon by the mail on the 3rd and 7th days of the month, and that their firm did in fact despatch letters by the mail on the 3rd and 7th days of May last to the said firm of *H. L. Layard & Co.* at Ceylon.

This deponent also stated that if he had been desirous on the 1st of May of communicating with Ceylon without unnecessary loss of time, he should, in the ordinary course of his business, have forwarded a letter by the mail, which was despatched from London on the 3rd or 7th days of the month of May; and that he should have done so, under the conviction that a letter despatched by

1846.

Ex parte  
KELSALE  
and others.

1846.

Ex parte  
KELSALE  
and others.

the mail of the 3rd or 7th days of the month would have reached Ceylon several days before a letter despatched by the mail of the 20th or 25th days of the month of May, and that to insure a letter addressed to Ceylon being despatched by the mail of the 3rd and 7th days of the month, it was necessary to add to the address of the letter the words "*via Bombay*;" that in the absence of such direction, the letter would not be despatched until the mail of the 20th and 24th day of the month, and that such regulation was well known to merchants and others in the habit of corresponding with India and Ceylon.

Mr. *Rolt* and Mr. *Bush*, in support of the petition, referred to *Burn v. Carvalho* (a), *Ex parte Flower* (b), *Belcher v. Oldfield* (c).

Mr. *Russell* and Mr. *Pryor*, for the assignees, contended that the security was not available, as the earliest possible notice of it was not forwarded to the parties in possession of the property. It was immaterial whether such notice could have reached its destination before the bankruptcy, so far as regarded the doctrine that a party claiming a lien should do all in his power to perfect his security. As to the portion of the merchandize which was at sea, it was true that no notice could have been given, but this part of the petitioners' claim was subject to another objection, viz. that the goods intended to be comprised in the security were not specified nor ascertained, nor indeed had either party the means of knowing what they were.

(a) 4 Myl. & Cr. 690.

(c) 6 Bing. N. C. 102.

(b) 4 D. & C. 449.



The CHIEF JUDGE.—If a man knows or believes that property of some description belonging to him is on its way from India to England, he may validly in equity contract to give a lien upon it, without knowing the particulars of which it consists. With respect to the shipments at Ceylon and Hong Kong, assuming that in the particular circumstances of this case laches might have been material, still there appears to me to have been no *laches* here. It is possible that by a particular course of proceedings, intelligence might have been despatched earlier, and by possibility it might have reached its destination sooner than by the course actually adopted, but I think it would be too strict and harsh to say that in taking that course the petitioners were guilty of laches.

1846.

Ex parte  
KEESALL  
and others.

Ex parte ARBOUIN and ALLNUTT.—In the matter  
of JOHN REAY and JOHN ROBERT REAY,  
and

Ex parte CHARLES GONNE and others.—In the  
same matter.

Dec. 22, 1845.  
February 25,  
June 20 and  
August 1, 1846.

FOR several years before and up to the end of the year  
1843, the bankrupt, *John Reay*, carried on the business

1. A wine merchant carrying on business under the firm of

*J. R. & Co.*, announced by a circular that he had taken his nephew into partnership. The business was thenceforth carried on under the style of *J. R. Sen. & Co.*, but as between the uncle and nephew, the latter received a salary only, and did not participate in the capital, profits or losses of the concern. On both becoming bankrupt, *held*, that a creditor who supplied goods to the firm might prove against the separate estate of the uncle.

2. Part of the stock in trade consisted of wines in the docks, which the uncle, on announcing the partnership, directed the Dock Company to deliver to the order of the new firm: *Held*, that these wines were in the reputed ownership of the two, and ought to be administered as joint estate.

3. Other property consisted of wines in the hands of a lien creditor of the uncle, and after the announcement of the partnership, some of the wines were withdrawn and replaced by others in the name of the new firm: *Held*, that the possession of the lien creditor did not prevent the application of the 72nd section, but that those wines also should, subject to the lien, be administered as joint estate.

4. Where a large number of creditors had a right of election to prove against the joint or separate estate, and the estates were not so ascertained as to enable the creditors to elect, a temporary order was made that no larger dividend should be declared of the one than of the other estate.

1846.

Ex parte  
 ANSOVIN  
 and another.

Ex parte  
 GOWNS  
 and others.

of a wine merchant in the City of London, under the firm of *John Reay & Co.* The bankrupt, *John Robert Reay*, was the nephew of the other bankrupt, and for several years previous to the end of the year 1843 was employed by his uncle as a clerk and traveller at a salary of 300*l.* per annum.

On the 31st day of December, 1843, the uncle told the nephew that he was going to give him an interest in the business, and on the following day handed to or placed before the nephew a paper to the following effect:—

“ 1000*l.* per annum for profits; 250*l.* for travelling expences; 250*l.* to keep the house in Mark Lane.”

Nothing further passed between them on the subject, nor were any articles of partnership ever executed. The following circular letter was, however, sent to those with whom the uncle had dealings :

“ Sir,

January 1st, 1844.

“ I beg leave to inform you that I have this day taken into partnership with me my nephew, Mr. *John Robert Reay*, who has been many years in my counting-house, and who is in every way entitled to my confidence. Hoping for the continuance of your kind friendship to our new firm of *John Reay, Sen. & Co.*

*John Reay,*

*John Reay, Sen. & Co.*”

Notwithstanding the change in the style or firm, the nephew never drew any cheque upon the bankers of the firm, nor drew nor accepted any bill of exchange in the name of the firm, but continued to discharge the duties of clerk or traveller in the same manner as he had theretofore done, and the actual control of the funds and property of the concern remained in and were exercised by *John Reay* alone, nor had *John Robert Reay* any

capital in the concern, or any share or interest in the stock and property.

On the 27th March, 1845, a joint fiat of that date was issued against the bankrupts by the name and description of *John Reay* and *John Robert Reay*, of Mark Lane, in the City of London, wine merchants, dealers and chapmen, and copartners, and the petitioners, *Charles Gonne* and *Henry Drury* and *F. H. Hogg* were the creditors' assignees, and the petitioner, *George Green*, the official assignee.

Creditors to a very considerable amount proved their debts against the joint estate of the bankrupts, and creditors to a small amount proved their debts against the separate estate of *John Reay* on his private account, or as sole trader carrying on the same business under the firm of *John Reay & Co.* up to 1st January, 1844.

On the 3rd July, 1845, a dividend of 1s. in the pound was declared of the supposed joint estate in favour of the creditors who had proved their debts against that estate, but this dividend had been received by very few of the creditors, and no dividend had been declared of the separate estate of *John Reay*, but such separate estate of *John Reay* was considerably larger in proportion to the separate debts which had been proved against it than the joint estate.

After the dividend was declared, it was first discovered that no partnership in fact subsisted as between the bankrupts, the creditors having been previously unacquainted with the nature of the arrangement between the bankrupts.

Upon the discovery of the real state of the case, the petitioners, Messrs. *Arbouin*, *Allnutt & Co.*, who had proved a debt of 640*l.* 9*s.*, contracted since the said 1st of January, 1844, against the joint estate, presented a

1846.

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Ex parte  
ARBOUIN  
and another.

Ex parte  
GONNE  
and others.

1846.

Ex parte  
 ARBOUR  
 and another.

Ex parte  
 GONNE  
 and others.

Dec. 22, 1845.

petition praying to be allowed to transfer their proof from the joint estate to the separate estate of *John Reay*.

Mr. *Steanston*, Mr. *Bacon* and Mr. *Bovill* in support of the petition. The petitioners had a right to elect whether they would prove against the apparent joint estate, or against the separate estate of the real debtor. This is established in principle by several authorities.

In *Kell v. Nainby* (a) the plaintiff brought assumpsit for business done as the defendant's attorney, and it appeared that the plaintiff carried on his business under the firm of *Kell & Son*, the name *Kell & Son* being written on the door of the office. All the communications to the defendant from the plaintiff had been signed *Kell & Son*, but the son was called to prove that he was merely a clerk to his father at a salary. It was objected that the son ought to have been a plaintiff, but on a motion for a new trial *Parke, J.*, said, "A party with whom the contract is actually made may sue without joining others with whom it is apparently made. Here there was no evidence to show that the son was actually employed by the defendant. The son proved that he was not an actual partner, and although he may have appeared to the defendant to have been a partner, unless he were a party to the contract, for the breach of which the action was brought, he need not join in such action. Here he was no party to that contract."

In *Skinner v. Stocks* (b) the defendants had bought whale oil of one of the plaintiffs, who were joint part owners of a vessel, and the Court said, "The action may be maintained either in the name of the person with whom the contract was actually made, or in the name of the parties really interested. This is continually done

(a) 10 B. &amp; Adol. 20.

(b) 4 B. &amp; Ald. 487.

in cases of policies of insurance. If the introduction of these names make any difference in fact to the defendant, by affecting his right of set-off, he may perhaps apply to the Court for relief. But the statutes of set-off do not prevent the action from being maintainable in the names of all the parties interested."

It is true that in all the cases hitherto decided the objection has proceeded on the ground of misjoinder or nonjoinder of plaintiffs. But the same principle obviously applies to the objection for misjoinder or nonjoinder of defendants, and therefore the present case is new in *specie* only.

They also referred to 1 *Smith's Leading Cases*, 490; *Wagh v. Carver* (a); *Parsons v. Crosby* (b); *Tee v. Elworthy* (c); *Ridgway v. Phillip* (d); *Bonfield v. Smith* (e); *Beckham v. Drake* (f); *Barker v. Stubbs* (g); *Peacock v. Peacock* (h); *Davenport v. Rackstraw* (i); *Guidon v. Robson* (k).

Mr. *Anderdon* and Mr. *Rogers* for the separate creditors cited *Bovill v. Wood* (l).

Mr. *Russell* and Mr. *Greene* for the assignees.

The CHIEF JUDGE.—The question in this case is whether expressly or by implication Mr. Reay, senior, undertook separately to pay the demand of the petitioners. Assuming that all the cases cited were correctly decided, I am not satisfied that they ought to govern

1846.

Ex parte  
Ansouin  
and another.

Ex parte  
Gonna  
and others.

(a) 2 H. Bl. 236.

(b) 5 Esp. 199.

(c) 14 East, 210.

(d) 1 Cr. Mees. & R. 415.

(e) 12 M. & W. 409.

(f) 1 M. & Gr. 738.

(g) 1 M. & Gr. 44.

(h) 2 Campb. 45.

(i) 1 Car. & P. 89.

(k) 2 Campb. 302.

(l) 2 Mau. & S. 23.

1846.

Ex parte  
ARBOUTIN  
and another.

Ex parte  
GONNE  
and others.

the present. If I can do anything upon this petition, it will not be more than to allow the petitioners an opportunity of trying the question in an action to be moulded by this Court.

This course being agreed to, it was ordered that the petitioners, Messrs. *Arbouin* and *Allnutt*, should be at liberty to bring an action against *John Reay* alone upon the debt proved by them, and that the defence to the action should be conducted by *James Foster*, a separate creditor of *John Reay*, and that the sole issue should be raised upon a plea in abatement, on the ground of the nonjoinder of *J. R. Reay*, the plaintiffs admitting that they had received a copy of the above-mentioned circular.

Guildhall,  
Feb. 25, 1846.

An action was brought accordingly, and was tried before the Lord Chief Baron and a special jury.

Mr. *Jervis* and Mr. *Bovill* for the plaintiff.

Mr. *Martin* for the defendant.

The *Lord Chief Baron* in the course of his summing up to the jury made observations to the following effect (a):—This is an action brought by Messrs. *Allnutt & Co.* against Mr. *John Reay* to recover the price of some brandies purchased of the plaintiffs at the latter end of the year 1844. The defendant has pleaded that the debt accrued to the plaintiffs, not from the defendant, *John Reay* only, but from *John Reay* jointly with another person named *John Robert Reay*. The replication denies that, and says that the debt accrued from *John Reay* alone. That is the issue in point of fact which you have to decide.

(a) Abridged from a transcript of Messrs. Gurney's shorthand note, kindly furnished by Mr. Greene to the reporter.

Your attention has been called by the counsel for the defendant to the fact that the question you have to decide is, with whom was the contract made. I have been turning the subject in my mind while the learned counsel has been addressing you, and I cannot see any distinction between that question and the question he seems desirous to avoid, namely, whether there was a partnership; for if there was not a partnership, then the contract was not made with the defendant and *John Robert Reay*. Whether the contract was so made or not seems to me entirely to depend upon the question whether there was a partnership. The learned counsel said that this is a single transaction, and that if they show that, in this single transaction, the plaintiffs were dealing with *John Reay* the elder and *John Robert Reay*, the contract was made with them. In reality, however, *John Robert Reay* knew nothing about the brandies, never heard of them, and it is only by reason of the name of the new firm being used, that he can be considered in any way interested in the transaction. If, therefore, the new firm, *John Reay, senior, & Co.*, did not include *John Robert Reay*, he was not included in the bargain, and the bargain was made with the other. It seems to me, therefore, that the question whether the contract was made with the defendant and *John Robert Reay*, and the question whether the two were partners, are for all purposes in truth and justice, and I think in common sense also, perfectly identical.

The question, therefore, is, was this a partnership? Was the nephew to have any interest in the business, or was he to go on as clerk? Was the partnership really a partnership, or was it a mere holding out of a man, for some reason or other, as a partner, who really was not

1846.

Ex parte  
ARBOURN  
and another.

Ex parte  
GONNE  
and others.

1846.

  
 Ex parte  
 ARBOVIN  
 and another.

Ex parte  
 GONNE  
 and others.

one? The brandies were sold on account of the plaintiff to *John Reay, senior, & Co.* The question is, who are *John Reay, senior, & Co.*?

After going through the evidence, his Lordship said,

You will say whether this seems to you to be analagous to a real *bond fide* letting a person into a community of interest. I shall lay down no rule whether there must be an absolute community in the whole of the profit or the whole of the loss either in any particular share or transaction. I shall ask you do you think the object of this was to create a partnership, or to create the appearance of a partnership only?

The learned counsel for the defendant dwelt very much upon this, that the nephew would have been liable if he had been sued. But he is liable to be sued, not because he has an interest in the concern, but because he has held himself out as a partner. His liability gives him no interest. Suppose the case of a clerk, whose name is published to all the world as that of a partner, but with whom there is an express stipulation that he shall not draw upon the bank, nor have any interest in the capital or profits; the clerk there would be liable possibly to any extent to which the concern might be insolvent; but I take it to be perfectly clear that he would have no interest in the capital, and that though he might be liable for the losses, that circumstance would not give him such an interest in the loss as would make him a partner. To have this effect, there must be a direct interest.

The jury returned a verdict for the plaintiff, damages 649*l.*

In the following Easter Term the Court of Exchequer was moved on behalf of the defendant in the action for a rule for a new trial, which was refused.



On this day the petition of Messrs. *Arbouin, Allnutt & Co.* came on to be heard on further directions.

1846.

Ex parte  
Arbouin  
and another.

Mr. *Swanston*, Mr. *Bacon* and Mr. *Bovill* for the petitioners.

Ex parte  
Gohms  
and others.

May 6.

Mr. *Anderdon*, Mr. *Peacock*, and Mr. *Rogers* for the separate creditors.

Mr. *Russell* and Mr. *Green* for the assignees.

The order was that the proof of the petitioners should be transferred to the separate estate of *John Reay*.

The assignees then presented the second of the above petitions, stating that there were no separate debts or assets of *John Robert Reay*, and that the petitioner, the official assignee, had received several sums of money in respect of debts due to *John Reay* prior to January, 1844, and which were included in the capital of *John Reay* on the formation of the alleged partnership between him and *J. R. Reay*, and might therefore be claimed to belong to the joint estate of the said bankrupts; but that no notice of any transfer thereof to the said joint estate appeared to have been given to the parties from whom such debts were due, and that it was doubtful whether such debts formed part of the joint estate of the bankrupts or of the separate estate of *John Reay*, and that in the event of the two estates being kept separate and distinct it would become necessary to have such question decided in due course of law. The petition also stated the pendency of an action, the result of which would regulate the conduct of the creditors of the joint estate in exercising any right of election as to the

1846.

Ex parte  
ARBOVIN  
and another.

Ex parte  
GOMEX  
and others.

transfer of their proofs from the joint estate to the separate estate of the said *John Reay*; and that there were other sums received and receivable under the fiat, the proper application of which would in like manner be open to doubt and question as between the joint and separate estates.

The petition prayed for a reference to the Commissioner to inquire and state whether it would be for the benefit of the general body of the creditors that the assets of the bankrupts should be consolidated upon any and what terms.

June 20.

*Mr. Russell* and *Mr. Greene*, in support of the petition, cited *Ex parte Parke* (a), *Ex parte Strutt* (b).

*Mr. Anderdon* and *Mr. Wigram* for some of the separate creditors of *John Reay* opposed the petition and referred to *Ex parte Langdale* (c), *Ex parte Hamper* (d), *Ex parte Jackson* (e), *Ex parte Sheppard* (f).

The COURT declined making an order as prayed except by consent, and ultimately the following order was made.

Let it be referred to the Commissioner to inquire and state to the Court, whether, having regard to two orders of the Court of Review made in this matter on the petition of *James Arbouin*, *John Allnutt* and *John Allnutt* the younger, the one dated the 2nd December, 1845, and the other dated the 6th May, 1846, and the trial and proceedings had under the said first mentioned

(a) 2 D. &amp; C. 1.

(c) 18 Ves. 30.

(e) 1 Ves. J. 131.

(b) 1 G. &amp; J. 29.

(d) 17 Ves. 403.

(f) 3 D. &amp; C. 190.

order in her Majesty's Court of Exchequer, any and what portion of the assets to be administered under the said fiat ought to be administered as the joint estate of the said bankrupts, with leave for the said Commissioner to state any circumstances specially.

1846.

Ex parte  
ARBOVIN  
and another.

Ex parte  
GONNE  
and others.

By his report, dated July 28, 1846, the Commissioner (Mr. *Goulburn*) found that there was a certain portion of the assets to be administered under the said fiat, which ought to be administered as the joint estate of the bankrupts, *John Reay* the elder being the true owner of all such assets; that such assets consisted of the proceeds of goods and chattels, being (at the time of *John Reay* and *John Robert Reay* becoming bankrupt) with the consent and permission of *John Reay*, the true owner thereof, in the possession, order or disposition of both the bankrupts jointly; and both the bankrupts being at such time and with such consent the reputed owners of such goods and chattels, and having taken upon themselves jointly the sale, alteration by, or disposition thereof as owners. What these assets were, and what the probable amount thereof would turn out to be (so far as was then capable of calculation), appeared by the schedule annexed to the report, subject to the judgment of the Court upon any questions of law to be raised upon the facts therein stated.

Among the assets mentioned in the schedule were some wines in the St. Katharine's Docks, with reference to which the facts found by the Commissioner were the following:—

In the month of January, 1844, a copy of the circular, (set out *suprà*, p. 360,) was sent to the St. Katharine's Dock Company, and on the fly leaf of such circular was

1846.

Ex parte  
 ARBOUR.  
 and another.

Ex parte  
 GOWNS  
 and others.

written the following authority, signed by the bankrupt  
*John Reay.*

"75, Mark Lane, 23 February, 1844.

To the Superintendent of St. Katharine's Docks.

Sir,

Please to deliver all wines and spirits standing  
 in our name to the order of *John Reay, senior, & Co.*

We remain, Sir,

Your obedient servants,

*John Reay & Co."*

The Dock Company acted upon the authority so given,  
 on receiving orders signed by *John Reay, senior, & Co.*

At the time of the bankruptcy the Dock Company  
 held the circular and authority above set forth, but such  
 authority had not been acted upon by *John Reay,*  
*senior, & Co.* so far as related to certain wines specified  
 in the report.

The directors of the St. Katharine's Dock Company  
 refused to deliver the wines in their possession to the  
 assignees, except on payment of a sum of 5770*l.* 5*s.* 2*d.*  
 claimed to be due to them for warehouse rent, wharfage  
 and other charges, and for which sum they claimed a  
 general lien on all wines in their possession standing in  
 the name of the said *John Reay* or of *John Reay, senior,*  
*& Co.* In order to obtain possession of any of the wines,  
 the assignees were compelled to pay the whole amount,  
 whereof 565*l.* 1*s.* 10*d.* had accrued due prior to the 1st  
 January, 1844, and the residue subsequently to that  
 date.

Another portion of the assets consisted of certain  
 wines deposited with one Mr. *Laing* under the following  
 circumstances.

In the year 1842, *Laing* discounted the acceptances of *John Reay* for 2500*l.*, taking as collateral security various wine warrants to the full value of the debt.

From time to time *John Reay* exchanged some of the wine warrants originally deposited with *Laing* for others of equivalent value.

After the formation of the alleged partnership in January, 1844, *Laing* received the acceptances of *John Reay*, senior, & Co. by way of renewal of *John Reay's* acceptances then arriving at maturity, and subsequently received warrants representing wines bought by the new firm in lieu of others then held by him.

At the time of the bankruptcy there remained due to *Laing* 2500*l.*, for which he held warrants representing sixty-eight pipes of wine, deposited with him by *John Reay* before the 1st January, 1844, and various other wine warrants belonging to the new firm.

Both these items were found by the Commissioner, subject to the judgment of the Court, to be joint assets of the two bankrupts.

The latter of the abovementioned petitions now came on to be heard on further directions upon the Commissioner's report.

*Mr. Russell* and *Mr. Greene* in support of the petition.

*Mr. Anderdon* and *Mr. Wigram* for separate creditors. As to the wines in the St. Katharine's Docks, they belonged to the elder bankrupt alone. The circular directed the company to deliver the wines according to the order of the two, but until an order was given, there is no ground for saying that the reputed ownership was changed.

1846.

Ex parte  
ARBOURN  
and another.

Ex parte  
GOMME  
and others.

1846.

Ex parte  
ARNOUIN  
and another.

Ex parte  
GONNE  
and others.

The authority given by the circular was revocable at any time before it was acted upon. If any one had inquired at the docks, he would have been told that the wines were standing in the name of *John Reay & Co.* not *John Reay, senior, & Co.* As to wines deposited with *Laing*, his security prevented the application of the doctrine of reputed ownership. Both the original and substituted deposits were the separate property of the elder bankrupt. They cited *Ex parte Taylor (a)*, *Greening v. Clark (b)*.


Mr. *Swanston* and Mr. *Bacon* for the joint creditors argued in favour of a consolidation of the joint and separate estates, or at all events that no larger dividend might be declared on the separate than on the joint estate.

The CHIEF JUDGE.—I am of the same opinion with the learned Commissioner as to both the items in question. .

The Order was that the report should be confirmed and that no larger dividend should be declared on the separate than on the joint estate, without prejudice to any application to the Commissioner or the Court to expunge or transfer any proof.

(a) Mont. 240.

(b) 4 B. & C. 316.



Ex parte JERWOOD.—In the matter of DOCKERY.

1846.

August 3.

THIS was the bankrupt's own fiat, and his solicitor now presented a petition for payment of his bill of costs out of the assets, which amounted to 48*l.*, and had been paid into the Bank into the name of the Accountant General. The solicitor's bill was taxed at 26*l.* 3*s.* 5*d.* The fiat issued September 3rd, 1844, the adjudication took place on the 6th of September, 1844. On the 14th of September a meeting was held for the choice of assignees, and, none being chosen, was adjourned till October 18th; no creditor then attending, the choice was adjourned *sine die*, and the bankrupt obtained his certificate.

Bill of solicitor of bankrupt suing out a fiat against himself, under which no assignees were chosen, ordered to be paid out of the fund in the hands of the Accountant General without making any reserve for the office fees of 10*l.* and 20*l.* The Accountant General ought not to be served with the petition for payment.

Mr. *Sturgeon* in support of the petition contended that it was not necessary to reserve 20*l.* and 10*l.* for the office fees, and cited *Ex parte Teague (a)* and *Ex parte Paterson (b)*. The Accountant General in Bankruptcy was served, but did not appear.

The CHIEF JUDGE ordered payment of the bill of costs out of the 48*l.*, and said that the Accountant General ought not to have been served.

(a) *Ante*, p. 140.

(b) *Ante*, p. 158.

Ex parte REYNOLDS.—In the matter of  
REYNOLDS.

Lincoln's Inn,  
August 3.

THE bankrupt had in this case sued out the fiat, and now presented a petition to have returned to him the fees of 20*l.* and 10*l.* which had been paid into the Bank to

Where a bankrupt sued out a fiat against himself, which was annulled, and no creditors' assignees had

been chosen, the office fees of 20*l.* and 10*l.*, paid by him into the Bank, were ordered to be returned.

1846.  
 Ex parte  
 REYNOLDS.

the account of the Accountant General in bankruptcy. There had been no choice of assignees and the fiat had been annulled.

*Mr. Southgate* appeared in support of the petition.

The CHIEF JUDGE ordered the fees to be returned.

Ex parte HODSON.—In the matter of HODSON.

November 4.  
 Petition of bankrupt to annul the fiat heard, although he had not surrendered, the time for his surrendering having expired between the presentation of the petition and the hearing.

*MR. Bacon* appeared in support of this petition, which was presented by the bankrupt to have the fiat annulled. The time for surrendering had expired since the petition was presented, and the bankrupt had not surrendered.

*Mr. Russell*, in support of the fiat, objected to the petition being heard before the bankrupt had surrendered, and contended that there was nothing to take this case out of the general rule. That rule was recognized and adopted in a long series of authorities. Such an authority was *Ex parte Jones*(a), where the petition was presented one day before the time for surrendering expired, but from particular circumstances was not answered till after the expiration of the time. The greater portion of the authorities were cases which were decided before the establishment of the Court of Bankruptcy; but soon after the institution of that Court the point was raised in *Ex parte Drake*(b), where the petition was presented before the forty-two days had expired, and actually came on to be heard before the expiration of the time for surrendering, the time having

(a) 11 Ves. 409.

(b) Mont. 486; 2 D. & C. 91.



been enlarged. The petition was nevertheless ordered to stand over, on the ground of the non surrender. *Ex parte Clarke* (a) was to the same effect. The whole subject was afterwards fully argued, and all the authorities cited in *Ex parte Kirkman* (b). The only cases opposed to this long and well considered series of authorities are *Ex parte Austin* (c) and *Ex parte Garnett* (d), in neither of which was the question discussed, nor were the authorities referred to.

1846.

*Ex parte  
Henson.*

**THE CHIEF JUDGE.**—Since the passing of the act 5 & 6 Vict. c. 112, the bankrupt is altogether precluded from disputing the validity of the fiat, unless he takes some step to dispute it within twenty-one days. As the petitioner was in no default when the petition was presented, I think it my duty to hear the petition.

The hearing then proceeded, and liberty was given to the bankrupt to dispute the validity of the fiat in an action, with certain admissions directed by the Court.

(a) Mont. & Bli. 379; and see Appendix, p. lxi. note x.

(b) 1 Mont. & Ayr. 709.

(c) 1 M. D. & D. 247.

(d) *Ante*, p. 95.

**Ex parte BROMAGE.**—In the matter of JONES.

**THIS** was the petition of an equitable mortgagee of a legacy bequeathed to the bankrupt, and it sought the usual order, the only question being as to the costs.

The solicitor for the petitioner was also the solicitor of the creditors' assignees, who consented to the petition.

Nov. 4 & 11.

Where, upon an equitable mortgagee's petition, the mortgagee and the creditors' assignees appeared by the same solicitor, the Court ordered the sale to be conducted as the Commissioner should think fit, having regard to this circumstance; and the official assignee was allowed his costs of appearing separately.

to be conducted as the Commissioner should think fit, having regard to this circumstance; and the official assignee was allowed his costs of appearing separately.

1846.  
Ex parte  
BROMAGE.

The official assignee appeared by a different counsel and solicitor, and also consented and asked for his costs.

Mr. *Metcalf* appeared in support of the petition.

Mr. *Makinson* consented on the part of the creditors' assignees.

Mr. *Roxburgh* for the official assignee also consented to the prayer of the petition, and contended that as the same solicitor appeared both for the petitioners and the creditors' assignees, the official assignee was justified in appearing separately.

Mr. *Metcalf* submitted that the official assignee could not have separate costs.

The CHIEF JUDGE said that in ordinary cases one set of costs could only be allowed to the assignees, but that here the petitioner had himself created a necessity for their appearance by different solicitors, by employing the solicitor to the fiat.

Mr. *Roxburgh* asked that the same order might be made as that in *Ex parte Rolfe* (a), where, the same solicitor being concerned for the assignees and the mortgagee, who was one of them, the Court directed that another solicitor should conduct the sale.

The CHIEF JUDGE said it would be sufficient to direct that the sale should be conducted in such manner as the Commissioner should think fit, having regard to the

(a) Mont. 515.

circumstance that the assignees' solicitor was also the solicitor of the mortgagee.

1846.

Ex parte  
BROMAGE.

Ordered accordingly.

Ex parte PERRY.—In the matter of PERRY.

THIS was the bankrupt's petition for leave to surrender.

December 2.

Where the bankrupt left England on account of his embarrassments, and consequently did not hear of the fiat till after the time for surrendering had expired, he was not allowed his costs on petitioning for leave to surrender.

In his affidavit, filed in support of the petition, the bankrupt stated that he had left England on March 27, 1846, in consequence of the embarrassed state of his affairs, and had not returned till the 2nd of June, when he heard for the first time of the fiat, which was issued against him on April 15th. The time appointed for his surrender was May 9th, and the present petition prayed that the time might be enlarged to January 19th, 1847.

Mr. *Kinglake*, in support of the petition, submitted that the bankrupt ought to be allowed his costs, and cited *Ex parte Smith (a)*.

Mr. *Osborne* appeared for the assignees.

The CHIEF JUDGE said that the case cited did not appear to be an authority for giving costs to a bankrupt, whose ignorance of the existence of the fiat arose from his having left England for the purpose of avoiding his creditors, or, as the present bankrupt expressed it, "in consequence of the embarrassed state of his affairs."

No Order as to the bankrupt's costs.

(a) 4 Dea. & C. 810.

1846.



Ex parte JOHN RUSSELL LAW.—In the Matter of  
LAWRENCE KENNEDY.

Lincoln's Inn,  
Dec. 2.

Assignees, who had brought an action against an annuity creditor of the bankrupt on a cross-demand, were, on the petition of the creditor, submitting to the jurisdiction of the Court, restrained from proceeding in the action.

*Semble*, that the Commissioner has no jurisdiction to value the annuity for the purpose of its value being set off in an action.

ON February 28th, 1847, the petitioner purchased from the bankrupt an annuity of 24*l.* per annum for the lives of himself and two other persons and the life of the survivor. The annuity was secured by bond, and the purchase money was 300*l.* The fiat issued on January 22nd, 1846; and on July 4th the assignees commenced an action against the petitioner on a bill of exchange for 550*l.*, drawn by the bankrupt on and accepted by the petitioner, who pleaded, among other things, a set-off for 259*l.*, as the value of the annuity.

The petitioner then applied to the Commissioner to value the annuity for the purpose of the set-off; but the Commissioner declined making any valuation, on the ground that the 54th section of 6 *Geo.* 4, c. 16 (a), only gave him jurisdiction for the purpose of proof.

The present petition prayed that it might be referred to the Commissioner to ascertain the value of the annuity.

Mr. *Parsons*, in support of the petition. The 6 *Geo.* 4, c. 16, s. 121, provides that the bankrupt, on obtaining his certificate, shall be discharged from all

(a) 6 *Geo.* 4, c. 16, s. 54, " Any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission."

claims and demands proveable under the commission, and therefore the annuity-creditor's rights will be completely extinguished unless he is allowed to set off the value of the annuity against the demand of the assignees. Why should he not be in the same condition as any other creditor whose demand would be barred by the certificate? The machinery for the valuation of the annuity, which is provided in the case of proof, can be equally made available where, from the existence of cross-demands, the case is not one for proof, but for set-off; and the 50th section of the act (a) expressly provides that every proveable demand may be set off.

1840.

Ex parte  
Law.

*Sir Francis Simphinson*, for the assignees, contended that the 54th section was not intended to apply, and did not apply, to a claim of set-off.

**THE CHIEF JUDGE.**—I cannot say, having regard to the terms in which the section is expressed, that I should have taken a course different from that which has been taken by the Commissioner. The framers of the act probably did not contemplate a case of this description. If the petitioner submits to the jurisdiction

(a) 6 Geo. 4, c. 16, s. 50, "Where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the Commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively, and every debt or demand hereby made proveable against the estate of the bankrupt may also be set off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed.

1846.

Ex parte  
Law.

of this Court, the assignees may be restrained from proceeding in the action, and the whole matter may be referred to the Commissioner, who will then set off one claim against the other.

The petitioner acceded to these terms, and an order was accordingly made to the following effect:


The petitioner, submitting to the jurisdiction of the Court, let the action be stayed.

Refer to the Commissioner to value the annuity, and, by consent, in taking the account, let the value of the annuity be taken to be £

And let the Commissioner take all the accounts between both parties, and ascertain whether, on the result, the petitioner has any and what right of proof, or whether any thing and what is due from him to the estate, and admit proof, or let the petitioner pay accordingly.

Reserve the costs of action and of the petition.

Liberty to apply.



**Ex parte COLLINS.**—In the matter of **RICKETT.**

1847.

January 13.

**MR. Greene**, on behalf of the public officer of the Copper Miners' Company in England, which was constituted a corporation by letters patent, applied for leave to file an affidavit of debt made by the public officer in support of a petition presented by the corporation for a fiat. He said that the ordinary practice required that the affidavit should be sworn by the creditor presenting the petition, and that the Lord Chancellor's secretary consequently declined issuing the fiat without the direction of the Court. The course now proposed to be taken had been sanctioned in Ireland by Sir Anthony Hart in *Ex parte Sneydes*, and *Ex parte the Bank of Ireland*, 1 Molloy, 261, after full argument, upon a petition to supersede.

Public officer of a corporation permitted to make the docket affidavit, where the corporation is the petitioning creditor.

The **CHIEF JUDGE.**—Let the fiat issue on the common seal of the company being verified, if any English precedent can be found where a fiat has issued under such circumstances; if not, it had better be mentioned to the Lord Chancellor.

The fiat was issued.

**Ex parte JOHN BARBER.**—In the matter of the **TRING, READING AND BASINGSTOKE RAILWAY COMPANY.**

January 13.

**THIS** was a fiat issued October 3rd, 1846, against a public company under 7 & 8 Vict. c. 111.

Form of order for director of a company, which has become

bankrupt under 7 & 8 Vict. c. 111, to surrender after the time limited for that purpose.

1847.

  
Ex parte  
BARBER.

The last examination was appointed to take place on the 11th of December, 1846. The petitioner was one of the directors of the company, and sought leave to surrender after the time limited by the Court, under the following circumstances :—

By an Order of the Court of Bankruptcy, made on the 26th of October, 1846, the Honourable *Francis Henry Fitzhardinge Berkeley*, the petitioner, and *Charles Edmund Green*, Esq., as three of the directors of the company, were directed to prepare the balance sheet and accounts of the company (*a*). The petitioner

(*a*) The following are the sections of the 7 & 8 Vict. c. 111, applicable to the case :—

Sect. 12. " And be it enacted, that it shall be lawful for the court authorized to act in the prosecution of a fiat in bankruptcy against any such company or body, at any time after the advertisement of the bankruptcy in the London Gazette, to order that the persons who were at the date of such fiat directors of such company or body, or such of them as such court in its discretion shall think fit, or if there be no directors, then such members of the company as such court in its discretion shall think fit, shall prepare such balance sheet and accounts, and in such form as such court shall direct ; and shall subscribe such balance sheet and accounts, and file the same in such court, and deliver a copy thereof to the official assignee ten days before the last examination under such fiat ; and such balance sheet and accounts, before such last examination, may be amended from time to time as occasion shall require and such court shall direct, and such persons shall make oath of the truth of such balance sheet and accounts whenever they shall be duly required so to do ; and such court may from time to time make such allowance out of the estate of such company or body, for the preparation of such balance sheet and accounts, and to such person or persons as such court shall think fit."

Sect. 13. " And be it enacted, that every such person ordered as aforesaid to prepare such balance sheet and accounts shall be under the like obligation to surrender to the court authorized to act in the prosecution of such fiat, at the hour and upon the day allowed for finishing the last examination under such fiat, and to sign and subscribe such surrender, and to submit to be examined before such court from time to time upon oath, and to make a full and true discovery of the estate and effects of such company or body ; and shall incur such damages or penalty for not surrendering, or for not signing or subscribing such surrender, or for not coming before the court, or for re-



was, however, absent from home when the order was made, and did not return till the 4th of December, 1846; and was, up to that time, ignorant that the order had been made, having only become acquainted therewith by finding at his residence a summons under the hand of the Commissioner, dated the 6th of November, 1846, whereby the petitioner and the two other directors above named were required to personally be and appear before the Commissioner forthwith; and on the 14th day of December then next, at half past eleven o'clock precisely, at the Court of Bankruptcy, Basinghall Street, London, then and there to be examined, and to make a full and true discovery and disclosure of the company's estates and effects, according to the direction of the acts of parliament in force concerning bankrupts.

The petitioner, upon inquiry then made by him, was informed and led to believe that it was considered that if one only of the three directors attended for exami-

fusing to be sworn and examined, or for not fully answering to the satisfaction of the court, or for refusing to sign or subscribe his examination, or for not delivering up at the last examination under such fiat all such part of the estate of such company or body, and all books, papers and writings relating thereto, as shall be in his possession, custody or power, or for removing, concealing or embezzling any part of such estate to the value of ten pounds or upwards, or any books of account, papers or writings relating thereto, with intent to defraud the creditors of such company or body, as is now by the law in force concerning bankrupts provided as to a bankrupt for not conforming to the like requisitions for the discovery of and in relation to the estate and effects of such bankrupt."

Sect. 14. "And be it enacted, that every such person, ordered as aforesaid to prepare such balance sheet and accounts, shall have such freedom from arrest and imprisonment in coming to surrender to such fiat and such discharge, if arrested in coming to surrender, as a bankrupt now has or may have under a fiat in bankruptcy against him; and such person or persons, if in prison, may be brought before such court by warrant, in like manner as such bankrupt now may."

1847.

Ex parte  
BARBER.

1847.

Ex parte  
BARBER.

nation in the Court of Bankruptcy under the fiat, and surrendered thereto on behalf of the company, the exigency of the summons would be satisfied; and it had accordingly been arranged between the solicitors acting for the company, and the solicitor acting for the assignees under the fiat, that Mr. *Fitzhardinge Berkeley* only should attend the last examination under the fiat, and surrender thereto on behalf of the company.

Mr. *Fitzhardinge Berkeley* accordingly attended the Court on the 11th day of December, 1846, at the last examination under the fiat, and duly surrendered thereto on behalf of the company; but the Commissioner then expressed his opinion that it was necessary that the petitioner and Mr. *C. E. Green*, as the two other directors who had been required to prepare the balance sheet and accounts of the said company, should also come in and surrender to the fiat at such examination, and such opinion, having been then communicated, Mr. *C. E. Green* attended the Court at such last examination, and duly surrendered to the fiat on behalf of the company.

The petitioner deposed by his affidavit, that had such opinion been communicated to him in time for him to have attended previously to three o'clock on the 11th of December, 1846, or if he had been aware or led to believe that his attendance was required there on that day, he would have been in attendance, but that he was never required to attend otherwise than by the summons which was left at his house in his absence, and which required his attendance on the 14th of December, and not on the 11th of December.

The petitioner having again left home previously to the 11th of December, and not having returned until the

18th, did not, until the latter day, learn the Commissioner's opinion, or by any other means become aware or believe that it was necessary for him to have attended on the 11th. The petitioner deposed, that he had always been ready and willing to submit to the fiat and the proceedings thereunder, and to do any act which might be requisite or necessary on his part under the fiat, and was advised that he ought to have gone in and surrendered on the 11th day of December, 1846, and that, under the circumstances aforesaid, his surrender could not be now accepted by the Commissioner unless by the leave or order of the Court.

The prayer was, that the petitioner might be at liberty to go in and surrender to the fiat, and that the Commissioner, acting in the prosecution of the fiat, might be at liberty to accept such surrender at any future meeting under the fiat, or to appoint a meeting on such day as he should think fit for accepting such surrender, and that the costs of holding any meeting to be so appointed and incident thereto, and also the costs of the petitioner of and incident to the petition, might be borne and paid out of the assets of the company.

Mr. *Fooks* supported the petition, which was not opposed.

The following was the form of the Order :

This Court doth order, that the Commissioner of her Majesty's Court of Bankruptcy, acting in the execution of the fiat in the said petition mentioned to have been awarded and issued against the said bankrupt company, be at liberty to appoint a sitting under the said fiat, of which


1847.

Ex parte  
BARBER.

1847.

  
Ex parte  
BARBER.

due notice is to be given and published in the London Gazette, and at such sitting the said *John Barber* is to be at liberty to surrender himself under the said fiat, and he is to make a full and true disclosure and discovery of the estate and effects of the said bankrupt company, and finish his examination under the said fiat; and the said Commissioner is to cause to be entered upon the proceedings, had and taken under the said fiat, the reason which prevented the said *John Barber* from surrendering himself and finishing his examination thereunder within the time before appointed for that purpose; and the creditors of the said bankrupt, who shall be present at such meeting, are to be at liberty to interrogate and examine the said *John Barber* touching the disclosure and discovery of the estate and effects of the said bankrupt company, as they shall think fit, and let the said Commissioner take the surrender and examination of the said *John Barber* in pursuance of this Order; and it is ordered, that the costs of the said petitioner and the respondents, of and occasioned by this application, be paid out of the estate of the said bankrupt company.



1847.

Ex parte WILLIAM SEVECKE HUGHES.—In the matter of WILLIAM OSBORNE the younger.

January 13.

THE fiat issued on July 2nd, 1846. *William Henry Osborne* the elder, the bankrupt's father, who had carried on the business of a goldsmith and silversmith, took the bankrupt into partnership on the 1st of August, 1842. On the 1st of October, 1844, the partnership was dissolved upon terms expressed in a deed of dissolution, according to which the bankrupt covenanted to pay certain annuities, and to indemnify his father against the payment of a certain debt of 2,500*l.* then due from the father, and all other the debts owing in respect of the copartnership business.

Where a creditor of the bankrupt, after attending to prove, and being prevented from doing so by the other business in court, became insolvent, and the title of his assignee was not complete in time to enable the assignee to prove: *Held*, that he must nevertheless pay the costs of his petition to stay the dividend, and of the requisite sitting to receive his proof, and retain them out of the insolvent's estate.

The second meeting under the fiat took place on the 26th day of August, 1846, on which day a brief was delivered to counsel by the solicitor of the father, and on his behalf, to support his claim to prove for the value of the annuities and in respect of the debt of 2,500*l.* which ought to have been paid in his exoneration by the bankrupt, but the whole of the time appropriated to the meeting was occupied by the examination of another bankrupt, and the present bankrupt's examination was not gone into. The counsel for the father intimated the object of his attendance to the Court, and the proof in respect of the father's claim was adjourned to the 7th of November, 1846.

On the 9th of October, 1846, the father presented his petition to the Court for the Relief of Insolvent Debtors. On the 24th day of October, 1846, he filed his schedule in that court, and was, on the 16th of November, 1846, brought up for examination, when the

1847.

Ex parte  
HUGHES.

present petitioner was duly appointed his assignee. On the 20th of November, 1846, the petitioner, through his solicitor, bespoke at the Insolvent Court the necessary documents to enable him to administer the estate of *William Henry Osborne* the elder.

On the 20th of November, 1846, a meeting was held under the bankruptcy for the purpose of making a dividend of the bankrupt's estate, and a dividend was declared. The petition, and the affidavit in support of it, stated, that the petitioner had not acquired, nor had the means of acquiring, the necessary information, nor had he obtained the particulars of the claim of *William Henry Osborne* the elder, in sufficient time to enable him to go in and prove in respect of such part thereof as accrued to the said insolvent's estate under the bankruptcy, and that in truth the petitioner was not aware, and never heard, that the dividend meeting, under the bankruptcy, was to be held on the 20th of November, 1846, at any time before the holding thereof. The prayer was, that the order of dividend might be rescinded, and that the Commissioner might be directed to call another meeting for the purpose of declaring a dividend, and might be directed to inquire into and investigate the claim of the petitioner, and to put a value upon the annuities, and to admit the petitioner's claim in respect of such value, and also in respect of the debt sought to be proved; and that in the meantime no payment might be made in respect of the dividend already declared.

Mr. *Glasse*, in support of the petition, cited *Ex parte Day* (a) and *Ex parte Dilworth* (b); but submitted, that as the omission to prove had arisen from no fault or

(a) Mont. 212.

(b) 3 Mont. Dea. &amp; De G. 63.

neglect of the present petitioner or of the creditor himself, the petitioner ought not to pay costs in the present case.

1847.

Ex parte  
HUGHES.

Mr. *Bacon* and Mr. *Elderton*, for the assignees, contended that the petitioner must pay the costs of the petition as well as of the requisite sitting to take the proof.

Mr. *Glasse*, in reply, said that under the present law the Courts were always sitting, so that the items of expense formerly arising for calling a meeting no longer existed.

The CHIEF JUDGE.—Suppose a creditor was overturned in a coach while coming to prove, and so placed under the necessity of presenting such a petition as this; could he call upon the general creditors to pay any part of the expense arising from his misfortune? I think that the usual form of order should be followed.

The following was the form of the Order:

This Court doth order, that the order of dividend of the estate of the said bankrupt, made on the 28th day of November, 1846, be rescinded, and that a meeting under the fiat in bankruptcy issued against the said bankrupt be forthwith held, of which due notice is to be given in the London Gazette; and that at such meeting the said petitioner be, and he is hereby at liberty to go in under the said fiat, and tender and make such amount of proof as he can establish in respect of the said debt in the said petition mentioned or

1847.

Ex parte  
HUGHES.

referred to, and upon such proof being made (if any), that the Commissioner of her Majesty's Court of Bankruptcy, acting in prosecution of the said fiat, do proceed to make a new Order of dividend under the said fiat to include such proof; and it is further ordered, that the costs of such meeting, and the costs of the said respondents the assignees, of and occasioned by this application, be paid to them by the said petitioner; and it is ordered, that the costs of the said petitioner, including the costs which he shall pay under this order to the said respondents, be paid to him when taxed out of the estate of the said *William Henry Osborne* the elder, an insolvent debtor, and it is hereby referred to *William Vizard, Esq.*, an officer of this Court, to tax all the aforesaid costs.

Ex parte JOHN DOWNES, JOHN ANSLOW,  
SARAH DODD and RICHARD DIXON  
SUMMERS.—In the matter of EDMUND  
GARBETT.

January 13.

The circumstances that the majority of the creditors, and a large proportion of the

debtors to the estate, reside within the jurisdiction of a district court, within which the trading took place, and out of which the bankrupt removed shortly before the bankruptcy, with the view, as it was stated, of having a friendly fiat issued against him in a Court where his conduct could not easily be investigated; that other bankruptcies, with which the one in question was connected, were in course of prosecution in the district court, and that many of the creditors were unable to afford the expense of a journey to London: *Held*, insufficient grounds for transferring the fiat from London to the district court, on a petition presented by creditors two months after the choice of assignees, and opposed by the assignees and the bankrupt.

It is not correct, or according to the course of the Court, for the assignees to employ as their solicitor the partner of one of them who is a solicitor; and when this appeared to be the case, the Court directed the circumstance to be intimated to the Commissioner.



The fiat issued on the 23rd of September, 1846, upon the petition of *John Owens*, of Moorgate Street in the city of London, Solicitor, the description of the bankrupt being, "*Edmund Garbett*, late of Bond Court in the city of London, and of Wellington in the county of Salop, formerly of Wellington aforesaid, and now of Skinner's Place, Sise Lane in the city of London, banker, bill broker, scrivener, dealer and chapman."

Assignees were chosen on October 7th, 1847. The debts and liabilities of the bankrupt, as appeared from his balance sheet, amounted in the whole to 43,574*l.* 7*s.* His alleged available assets amounted to 6,490*l.* 5*s.* 5*d.*

One of the petitioners claimed to be a creditor for 500*l.* and upwards, another for 1100*l.*

The bankrupt carried on the business of an attorney and solicitor at Wellington up to the 16th day of February, 1846, when he entered into partnership with one Mr. *James Dulling*, also a solicitor there, and the business was afterwards carried on by them in partnership at Wellington from the 16th of February down to the 6th of August following, when the partnership was dissolved, and the business of the office was carried on by *James Dulling* alone, at the offices where the business had been carried on during the co-partnership, (which offices adjoined the dwellinghouse of the bankrupt,) until the 2nd of November, 1846, when the bankrupt took possession of the dwellinghouse and offices.

The affidavits in support of the petition stated, that the bankrupt was for some time a shareholder and proprietor in a joint stock bank, carrying on business in Shropshire, and having branch establishments in the

1847.



Ex parte  
Downes  
and others.

1847.

Ex parte  
Downes  
and others.

towns of Newport, Ironbridge and Wellington, all in the county of Salop; and that he also was, and carried on the business of, a money scrivener and bill broker at Wellington, and thereby and by no other act of trading, (save and except by being a secret partner in the Langley Fields Colliery and Ironworks) became a trader within the meaning of the bankrupt laws. That he had frequently represented himself to the petitioner, *John Downes*, and to many of his other creditors, to be a proprietor and part-owner of a certain valuable colliery and ironworks, situate in the parish of Dawley in the county of Salop, known by the name of the Langley Field Colliery and Ironworks, and which was carried on under the style and firm of the "Langley Field Company." That the affairs of two bankrupts, named *William Clemson* and *James Lewis*, whose bankruptcies were in the course of administration in the Birmingham District Court, were intimately mixed up with the affairs of the present bankrupt; and that the bankruptcy of *William Clemson* and *James Lewis*, as stated by them, and as appeared from their respective balance sheets, was entirely owing to their connexion with the bankrupt *Edmund Garbett*; and that the debts of *William Clemson*, due from him on his own account, as appeared by his balance sheet, amounted to 72*l.* or thereabouts, and his debts or liabilities, incurred by him for and on account of the bankrupt *Garbett*, amounted to 4000*l.* or thereabouts. That the debts of *James Lewis*, due from him on his own account, amounted to 45*l.*; and that his debts and liabilities, incurred by him for and on account of the bankrupt *Garbett*, amounted to between 2000*l.* and 3000*l.* That *John Lewis* and *Edward Lewis* had been, for a consider-

able time past, mixed up in various bill transactions with the bankrupt *Garbett* to a great extent, and far beyond their means or expectations, and solely for the use and accommodation of the bankrupt *Garbett*. That the bankrupt *Garbett* was a married man and had a family, and resided at Wellington, in a house of which he was lessee, until the month of August, 1846, when he removed his residence and took his family to reside in a ready furnished house at Blackheath near to London; but that his place of residence was carefully concealed from his creditors, and, in fact, was known only to a few of the bankrupt's most intimate friends. That it appeared by the accounts rendered by the bankrupt *Garbett* to the official assignee under his estate, that he had 150 creditors in number, and that upwards of ninety-four of such creditors resided within the Birmingham district. That the majority of the creditors resident in London were bill discounters; and that many of the persons, upon whom the bills had been drawn by the bankrupt, were persons without any means of paying the same, and must have accepted such bills for the accommodation of the bankrupt only, and not for value. That the debtors to the estate of the bankrupt, as set forth by him on his balance sheet, amounted in number to 889; and that all such debtors, with the exception of eighteen or thereabouts only, viz. 871, resided within the Birmingham district. That several of the debts due and owing to the country creditors of the bankrupt *Edmund Garbett* were for small sums; and that there were many other creditors of the bankrupt, who were not named in the accounts rendered by him as aforesaid, resident in and near Wellington. The town of Wellington is in the Birmingham district

1847.

Ex parte  
Downes  
and others.

1847.

Ex parte  
DOWNES  
and others.

of the Court of Bankruptcy, and is distant from Birmingham 34 miles, and from London 150 miles or thereabouts.

The petition and affidavits further stated, that the fiat was a friendly one; and that the bankrupt took up his abode in London for a short time before his bankruptcy, in order to have the fiat issued against him and prosecuted in London, at a distance from a greater part of his creditors, many of whose debts were contracted under circumstances of gross fraud, and to prevent their attending to examine the bankrupt as to his various dealings and transactions in respect of which such debts arose; and that it was absolutely and indispensably necessary for the ends of justice, and for the discovery and due administration of the estate and effects of the bankrupt, that many of his creditors, resident in the Birmingham district, and other persons also resident there, should be personally examined under the fiat so issued against him touching his estate and effects, and his dealings with his creditors; and that it was also expedient that the examination should take place before the same Commissioner who was acting under the fiats against *William Clemson* and *James Lewis*; and that the Commissioner acting in the prosecution of those fiats on the 22nd November, 1846, adjourned their respective examinations *sine die*, upon it being represented to him that some of the creditors of the bankrupt *Garbett* intended to present a petition for the removal of the fiat against *Garbett* to the Birmingham district, in order that he might have an opportunity of looking into and examining the transactions between them. That many of the creditors resident in Wellington, Shrewsbury and other places

in the county of Salop and adjoining counties, who were desirous of examining and opposing the bankrupt, were persons of very limited means, and unable to defray the costs and charges of a journey to and from London.

The affidavits in opposition and reply were of great length and of a very personal nature.

Mr. *Russell* and Mr. *Glasse* supported the petition, and contended that this case was distinguishable from *Ex parte Mitchell*(a).

Mr. *Swanston*, Mr. *Bacon* and Mr. *E. James*, who appeared on behalf of the assignees and the bankrupt to oppose the petition, were stopped by the Court.

The CHIEF JUDGE.—It was right originally and is still right that this should be a London fiat. It is a matter of judicial discretion, having due regard to all the circumstances of the case, whether the fiat should continue in the jurisdiction to which it was originally addressed, or should be transferred to another jurisdiction; and it is clear that the burthen of proof is upon those who seek its removal. That inconvenience will be sustained, or appears likely to be sustained, by some persons, if the fiat remain where it is, does not seem a sufficient reason for transferring it, since it is scarcely possible to suppose a case of any complication or magnitude in which there may not be some persons to whom the jurisdiction may be inconvenient. There must be some grave and preponderating reason. In the present

1847.

Ex parte  
Downes  
and others.

(a) 3 Mont. Dea. & De G. 397.

1847.

Ex parte  
Downes  
and others.

instance the Commissioner has intimated no opinion for or against the change of jurisdiction. The bankrupt and the assignees oppose the change. The grounds, upon which the creditors seeking the removal rely, are, that the transactions in which the bankrupt was engaged took place mainly or principally in Shropshire, at a place above twenty-five miles from Birmingham, and that much trouble and expense will be saved by prosecuting the fiat at Birmingham, owing to the circumstance that various bankruptcies or insolvencies, with which this bankruptcy is more or less connected, are in the course of administration at Birmingham. It is impossible, however, not to see that the difference in point of expense and trouble to creditors residing at or near Wellington, between London and Birmingham, cannot be very considerable, especially when attention is given to the 85th section of 5 & 6 Vict. c. 122, which provides that the several Courts authorized to act in the prosecution of fiats in bankruptcy shall be auxiliary to each other for proof of debts, and for the examination of witnesses on oath, or for either of such purposes; and that the Court so acting as auxiliary in the prosecution of any fiat in bankruptcy in the examination of witnesses, shall possess the same powers to compel the attendance of and to examine witnesses, and to enforce both obedience to such examination and the production of books, deeds, papers, writings, and other documents, as are possessed by the Court to which such fiat is directed. Under this provision any investigation which could be more conveniently made at Birmingham may be prosecuted there, and thus the inconvenience (if any) would be considerably lessened. When I add to these considerations the further consideration, that there are persons

to whom plainly and unquestionably the London jurisdiction is more convenient than that of the district Court, and remark, finally, that the fiat issued in September; that the choice of assignees took place early in October, and that it was not before the 5th of December that this petition was presented; I find myself obliged to say that I cannot make any order for the removal of the fiat. The petition must be dismissed with costs, those of the bankrupt not to exceed 110*l*.

1847.

Ex parte  
Downes  
and others.

In the course of the hearing, it appeared that the assignees' solicitor was the partner of one of them, who was a solicitor.

The CHIEF JUDGE said, that this was not correct or according to the course of the Court, and referred to *Ex parte Badcock* (a) and *Ex parte Rice* (b), in which such a proceeding had been disapproved by Lord Lyndhurst and Lord Brougham; and his Honor requested the registrar to call the Commissioner's attention to the circumstance.

(a) Mont. & M'Arth. 243.

(b) Mont. 259.

1847.

January 13.  
A farmer in the Isle of Thanet, occupying two farms containing together 200 acres, kept five cows, four of which were Alderneys, and seven horses, and no other stock: *Held*, that his selling the milk of the cows regularly to a retail dealer in Margate, who paid for it on an average 30s. a week, did not render him subject to the bankrupt laws as a cow-keeper.  
When the fiat was sued out by the bankrupt on September 19, and assignees were chosen on October 9, and the certificate allowed on December 14: *Held*, that a creditor's petition to annul, presented on December 14, was not too late.

Ex parte MARY DERING and WILLIAM BROOKE.—In the matter of JOHN CRAMP.

**THIS** was the petition of an execution creditor, to annul the fiat (which was sued out by the bankrupt himself), on equitable grounds, and for want of trading.

The bankrupt held, of the trustees of Bethlehem Hospital, two farms in the Isle of Thanet, between Margate and Broadstairs, containing together 200 acres, at a rental of 500*l.*; and by the terms of his holding he was bound to fodder his straw and green crops upon the farms.

The affidavits filed by the respondents, the assignees, in support of the fiat stated, that the whole of one of the farms had originally been cultivated as arable land, but that for the last five years two acres had been converted into pasture for the purpose of keeping five cows and selling the milk, and that a dairyman in Margate, named *John Allen*, bought all the milk of the bankrupt, paying him for it on an average 30s. a week. It was further deposed in these affidavits, that the cows were kept for this purpose only, and not as farm stock, a considerable portion of the farms being sown with canary seed, and the manure for it being all purchased, so that no stock was needed in its cultivation.

In support however of the petition, a witness, named *Edward Wootton Rammell*, of Dent de Lion near Margate, deposed, that he was the manager of a farm of 450 acres, or thereabouts, known as Dent de Lion Farm, situate at Garlinge, in the parish of St. John the Baptist in the Isle of Thanet, in the county of Kent aforesaid, and that he was a tenant under a lease of



another farm called Street Green Farm, which contained about 100 acres, and was also situate in the parish of St. John the Baptist aforesaid. That he was therefore well acquainted with the mode of farming in the Isle of Thanet, and with the size or extent of most of the farms in the aforesaid parish of St. John the Baptist, as well as in the adjoining parishes, and was also acquainted with the owners or occupiers thereof. The deponent further stated, that he was well acquainted with the bankrupt, and with the farms held by him, as the same abutted, as to part thereof, on Dent de Lion Farm. That he had been informed, and from his local knowledge believed, that the land farmed by the bankrupt amounted to 200 acres or thereabouts, and that the bankrupt was not in the habit of keeping any stock upon his said farms, excepting such horses as were absolutely necessary to work the same and four or five cows, four of which were small cows of the Alderney breed. That the said horses and cows together were not, in the deponent's opinion, sufficient stock properly to consume the straw, clover and green crops; and the witness further deposed, that knowing as he did the various farms in the neighbourhood, he could safely and did depose to the fact, that no farm of the extent of those held by the bankrupt had so little stock upon it, and that the majority had more cows in proportion as well as other stock. That upon the farm at Dent de Lion there were eleven cows, and upon the farm at Street Green seven cows, besides much other stock. That it was the universal custom amongst the farmers in the neighbourhood regularly to dispose of any milk, which they did not require for their own consumption or that of their farm servants, to retail vendors, and that the bankrupt sold his surplus milk to a cow-

1847.

Ex parte  
DERING.  
and another.

1847.

Ex parte  
DEFEND  
and another.

keeper of the name of *Allen*, who was his tenant and lived near him, and that the same course was pursued by the deponent in respect to the surplus of milk produced by the cows upon *Dent de Lion* and *Street Green* farms, which was sold to *Allen* and other parties, and for the reason that it was more profitable than making butter for sale and using the skimmed milk upon the farms.

Another witness, named *William John Bartlett*, of *Street Lodge Farm*, in the *Isle of Thanet*, farmer, deposed, that he was the tenant of the above farm, containing 140 acres or thereabouts. That he kept six milking cows upon his farm besides heifers and other stock. That after supplying his family and farm servants, the remainder of the milk produced by the said cows was usually sold by him to one *George Stead*, who was a retail vendor. That he found cows more profitable to keep on his farm as stock than bullocks, because from the nature of the country they were easier to feed and at the same time foddered the straw and green crops on the premises equally well. That he did not know of a farm in the neighbourhood upon which there was not more stock in proportion to the size than there was upon the farms of the bankrupt, and that the great majority had more cows in proportion. That the bankrupt's cows were not of the sort usually chosen by cow-keepers, and as he never changed them he could not have had more than two or three in good milk at any one time, which (considering the small quantity of milk produced by *Alderney* cows) the deponent considered could have left no great surplus for disposal at any time, after supplying the wants of the family and farm servants, and frequently none at all. That the deponent, although

he had many more cows upon his farm in proportion to the size thereof than the bankrupt had upon his aforesaid farms at Garlinge, and regularly sold his surplus milk in the same manner as the bankrupt did, nevertheless did not consider himself a cowkeeper or milkman; and the deponent lastly said, that he had never heard the said *John Cramp* call himself a cowkeeper or milkman, nor had he considered him to be one himself, nor had he ever heard others so designate or speak of him; and that he was certain that had any one so designated the said *John Cramp* previously to the late bankruptcy proceedings, he would have considered himself personally insulted.

Another farmer of the neighbourhood deposed, that cows were invariably kept by the farmers in the neighbourhood of Margate in preference to bullocks, inasmuch as from the nature of the land, which is almost entirely arable and upland, the latter were not kept to advantage; whereas cows, which were as useful, were far more cheaply fed, and in addition returned a profit from the milk they produced, which, from the vicinity of such farms to Margate and Ramsgate, they were enabled to sell (after supplying themselves and families and farm servants) to retail vendors or milkmen. That the farmers seldom made butter for sale, as there was usually a ready market for their surplus milk in the manner aforesaid. That Alderney cows, although they produced a rich milk, gave very little in quantity, and were more expensive than the common breed, and quite unsaleable when out of milk, which they were very liable to become, as they would not fatten for the butcher as the others would; and that for these reasons they were kept chiefly for fancy and private use, and were not selected by cow-

1847.

Ex parte  
DERRING  
and another.

1847.

Ex parte  
DERRING  
and another.

keepers, who usually fattened up and got rid of their cows when they had done giving milk, and bought young cows with calves of the farmers in the neighbourhood, so that they were continually changing their stock, whereas the bankrupt had for years kept the same cows on his farm. That from this circumstance the bankrupt could not have on an average more than two or three of his cows in good milk at any one time. And the deponent lastly said, that the sale of milk by the farmers in that neighbourhood was merely a portion of the profits or returns of their farms generally and incidental to their keeping cows as stock for making manure; and that such farms were hired not for the purpose of keeping and grazing cows, but that the cows were kept for the purposes of the farm.

The fiat issued on September 19, 1846, and assignees were chosen on the 9th of October. On the 14th of December the certificate was allowed by the Commissioner, and the petition was presented on the same day. The certificate had since been confirmed.

Mr. *Swanston* and Mr. *Collins* for the petitioner contended, that the description of cow-keeper was introduced into the new act for the purpose of bringing within the scope of the bankrupt laws keepers of cows in the neighbourhood of great towns, whose object was principally or entirely to make profit by the sale of milk, such as Mr. *Rhodes* was, for example; and not to include farmers who kept cows for the purposes of their farms. A man who held two hundred acres and kept five or six cows could no more be called a cow-keeper than one who kept two hundred cows on fifty acres could be called a farmer. The question was, was the land

hired for the purposes of the cows, or were the cows kept for the purpose of cultivating the land. The evidence left no doubt on this question.

1847.

*Ex parte*  
DERING  
and another.

Mr. *Bacon* and Mr. *Dumergue* for the assignees. It is clear that the two acres were turned into pasture for the sake of the cows, and that the keeping of the cows was a distinct speculation from the farm. A distinct account was kept of the milk dealings. The cows could not have been kept for manure, because the evidence showed that the manure was all purchased, and the straw and fodder exchanged. The produce of the farm being principally canary seed, a different kind of manure was requisite; and it was not necessary to keep any cows or oxen for farm purposes, nor were any kept for a considerable time. The sole inducement for keeping them was the profit derived from the milk. It could not, therefore, be said that the cow-keeping here was merely incidental to the farming. They cited *Ex parte Bryant*(a).

The CHIEF JUDGE.—Would a Cheshire farmer, whose profits arise chiefly from his dairy, be a trader as a cow-keeper?

Mr. *Russell* and Mr. *Cooke* for the bankrupt contended, that the delay in presenting the petition until the certificate was obtained was of itself a sufficient answer to it.

Mr. *Swanston* in reply was stopped by the Court.

The CHIEF JUDGE.—Although the act specifies cow-

(a) 1 Ves. & Bea. 211; 2 Rose, 1.


1847.  
~  
Ex parte  
DERING  
and another.

keepers as persons liable to the bankrupt laws, it does not of course mean to include all persons who keep cows. The bankrupt here was a farmer and kept cows, but was not, I think, a cow-keeper within the meaning of the act. Although the petition is late, I cannot say that it was not presented in time; for I have known cases in which commissions have been superseded when the petitions were presented later. On the mere dates I cannot refuse relief. The fiat must be annulled; but with respect to costs, I will hear the respondents on the question of equitable invalidity.

The other facts of the case were then discussed, from which it appeared that a negotiation had been going on, and that the issuing of the fiat was contrary to the understanding, between the parties, upon which the negotiation proceeded.

The CHIEF JUDGE said, that if any difficulty had existed as to the time of the presentation of the petition, it would be removed by the fact of the equitable invalidity of the fiat.

The fiat was ordered to be annulled, and the alleged bankrupt was ordered to pay the costs of the petitioners and the assignees.



Ex parte JENKIN POWELL.—In the matter of  
PHILIP VAUGHAN.

1847.



January 20.

Form of order  
on petition of  
equitable sub-  
mortgagee.

THE bankrupt was transferee of a legal mortgage in fee of hereditaments in the county of Brecon, the original mortgage debt being 420*l*. He deposited the title deeds with the petitioner as a security, with the following memorandum:—

“ I do hereby deposit with Jenkin Powell, Esq., certain mortgage securities, due to me on certain hereditaments in the borough of Talgarth in the county of Brecon, as a security for the repayment of the sum of four hundred pounds, for which he has this day become responsible for me; and I undertake to assign such mortgage to Mr. Powell whenever so required and at my expense. Dated this third day of January, 1844.

“(Signed) Philip Vaughan.”

The petitioner sought the common Order in the case of an equitable mortgage, but as some trouble was recently experienced in finding a precedent in the case of a sub-mortgage, the form of the Order is given in the present case.

Mr. *W. M. James* supported the petition.

Mr. *Smythe* appeared for the assignees.

The Order, after containing the usual direction that the Commissioner should take an account of what was due to the petitioner on his security, directed that the petitioner and the assignees should be at liberty, with the approbation of the

1847.

Ex parte  
POWELL.

Commissioner, to fix a price or sum at which the petitioner was to be at liberty to be the purchaser (a) of his security by private contract; and if the petitioner should not so become the purchaser, then it was ordered, that the interest of the bankrupt in the mortgage should be sold before the Commissioner, of which due notice was to be given and published in the London Gazette, and in such other of the public newspapers as he should think fit, when and where the said interest of the bankrupt was to be sold before the Commissioner; and that such sale should be made accordingly, and be conducted by the assignees under the fiat: and further, that the petitioner by himself, or his agent, should be at liberty to bid at the said sale for the purchase of the said interest of the bankrupt or any part thereof; and that all proper parties should join in such sale, whether by private contract or public auction, and in the conveyances, assignments, or other assurances thereof to the purchaser or purchasers, as the Commissioner should direct.

(a) This portion of the Order is, of course, not part of the common form, but had reference to the particular circumstances of the case.

Another form of Order, in a somewhat different case of equitable sub-mortgage, was adopted in the case of *Ex parte Burdis re Thompson*, June 28th, 1843. The petitioner was the public officer of the North of England Joint Stock Banking Company, and the bankrupt in whose bankruptcy the petition was presented, was the original mortgagor of certain property of which he was lessee, the original mortgage being a legal one for £600. The mortgagee, a Mr. Charrton, deposited the deeds with the bank to secure the balance due from time to time, and both mortgagor and mortgagee became bankrupt.

Mr. Bayley supported the petition.



Mr, *Clarke* appeared for the assignees of the mortgagor.

Mr. *Bates*, for the assignees of the mortgagee, submitted to the jurisdiction of the Court.

1847.

Ex parte  
Burdiss.

The following was the form of the Order :—

This Court doth declare that the said banking company are equitable mortgagees of the hereditaments and premises comprised in the title deeds so deposited with the said banking company, as mentioned in the said petition; and it is ordered, that it be referred to the Commissioner of her majesty's Court of Bankruptcy, acting in the prosecution of the fiat awarded and issued against the said bankrupt *George Thompson*, to take an account of the principal and interest due from the estate of the said *George Thompson* to the estate of the said bankrupt *Thomas Charlton*, in respect of his security; to take an account of the principal and interest due from the estate of the said bankrupt *Thomas Charlton* to the said company, in respect of their said securities; and also to inquire whether the said *Thomas Charlton* or the said banking company, or any person or persons by their or either of their order, or for their or either of their use, are or have been in possession of the said premises, or in receipt of the rents and profits thereof; and if they or either of them have been in possession, or in receipt of such rents and profits, then to take an account of the rents and profits received by them or either of them, or by any other person or persons by their or either of their order, or for their or either of their use, as mortgagees in possession; and for the better taking the said account and inquiries, all necessary and proper parties are severally to be examined before the said Commissioner upon interrogatories or otherwise touching the matters in question, as the said Commissioner shall think fit, and are severally to produce before him upon oath all books, papers and writings in their or either of their custody or power relating thereto, as the said Commissioner shall direct; and it is further ordered, that the said hereditaments and premises be sold before the said Commissioner, of which due notice is to be given and published in the London Gazette, and in such other of the public newspapers as he shall think fit, when and where the said hereditaments and premises are to be sold before him or by public auction, at any other place or places, if he shall so think fit; and that such sale be made accordingly, and be conducted by the assignees under the said fiat against the said *George Thompson*; and that the assignees of the said bankrupt *Thomas Charlton*, and the banking company and all other proper parties, do join in such sale, and in the conveyances, assignments, or other assurances thereof to the purchaser or purchasers, as the said Commissioner shall direct; and it is ordered, that the monies to arise from such sale be applied in the first place

1847.

Ex parte  
BURDIS.

in payment of the expenses of the assignees of the said *George Thompson* attending such sale, and of the proceedings incident thereto, such expenses to be settled by the said Commissioner, or by *Daniel Higley Richardson, Esq.*, one of the deputy registrars of the Court of Bankruptcy, and then in payment to the said petitioner, as such public officer as aforesaid, of what shall be found due from the estate of the said *Thomas Charlton* to the said banking company, to the extent of what, if anything, shall be due from the estate of the said bankrupt *George Thompson* to the estate of the said *Thomas Charlton*, after deducting any rents received by the said *Thomas Charlton* or by the said banking company as mortgagees in possession as aforesaid; and this Court doth reserve the consideration of how the surplus of the proceeds, if any, is to be applied; and doth also reserve the consideration of all further directions and costs in the matter of the said petition, and any of the parties are to be at liberty to apply to this Court touching the matters aforesaid.



Ex parte JAMES CUNLIFFE and SAMUEL  
BROOKS.—In the matter of SAMUEL ARCHER.

Westminster,  
January 27.

Where a creditors' assignee omitted to pay over to the official assignee the balance in his hands, and the Commissioner had directed the payment with 20 per cent. upon the amount: *Held*, that application should be made to the Commissioner to enforce his order, and creditors were not allowed the extra costs occasioned by applying to the Court of Review.

The 6 *Geo. 4*, s. 104, directing payment of 20l. per cent. by assignees retaining part of the estate in their hands, means 20l. per cent. per annum.

*Semble*, that the offer of a cheque on a banker at a town where the estate has no banker, is not a proper tender by a creditors' assignee to the official assignee.

ON January 22, 1846, the fiat was issued, directed to the District Court of Bankruptcy at Manchester.

At the first public meeting, on the 18th of February, 1846, *James Butterworth, Charles Dransfield* and *John Milnes* were chosen creditors' assignees.

On the 25th of June, 1846, the petitioners proved a debt of 1275l. 13s. 8d.

At a meeting held on the 23rd of June, 1846, pursuant to notice in the London Gazette, to audit the accounts of the assignees, Messrs. *Butterworth* and *Dransfield* appeared before the Commissioner. *Butterworth* then delivered upon oath an account of his receipts and payments, as one of the assignees under the fiat,

and *Dransfield* stated upon oath that he had not re-

ceived or paid any monies belonging to the bankrupt estate.

In addition to the notice in the London Gazette the messenger of the Court caused a written notice of the meeting and of the purport thereof, to be given to *John Milnes*, the other creditors' assignee. *Milnes*, however, did not appear before the Commissioner at the meeting, nor render any account of the monies received or paid by him belonging to the bankrupt's estate, nor did he show to the Commissioner any sufficient cause for his non-appearance. The Commissioner thereupon adjourned the further auditing of the accounts until the 7th of July following, and ordered the costs and expenses to be occasioned by such adjournment, and of the further auditing of such accounts, to be taxed and allowed by one of the registrars of the said Court, and to be paid by the assignee *John Milnes*.

On the 7th of July, and pursuant to notice in the London Gazette, the Commissioner sat by adjournment at the Court of Bankruptcy at Manchester; and *Milnes* having been summoned appeared before the Commissioner, but was not prepared to pass his account or to pay over to the official assignee the monies received by him belonging to the bankrupt's estate.

The Commissioner thereupon adjourned until the 14th of July the further auditing of the accounts, and ordered that the costs and expenses to be occasioned by such further adjournment should be borne and paid by *Milnes*.

On the 14th of July, pursuant to notice in the London Gazette, the Commissioner sat accordingly by adjournment, and *Milnes* having been duly summoned appeared, and delivered in upon oath an account, purporting to be a full and true account of all his receipts and

1847.

Ex parte  
CUNLIFFE  
and another.

1847.

Ex parte  
CUNLIFFE  
and another.

payments as one of the assignees. This account showed the sum of 166*l.* 3*s.* 11*d.* to be then in the hands of *Milnes*; and the Commissioner being of opinion that *Milnes* had retained in his hands and employed for his own use various sums of money received by him as such assignee, contrary to the provisions of 6 Geo. IV. c. 16, ordered him to pay to the official assignee acting under the fiat 30*l.* 10*s.*, being interest at the rate of 20*l.* per cent., for such time as he had retained the money; and that he should also pay interest at the like rate for the sum of 166*l.* 3*s.* 11*d.* for such time as he should continue to retain the same. The Commissioner further ordered that *Milnes* should pay the costs and expenses of that meeting, as well as of the former audit and adjourned audit meetings.

The official assignee had made several applications to *Milnes* for the 30*l.* 10*s.*, and also for the sum of 166*l.* 3*s.* 11*d.* and such further interest as might be due thereon, in pursuance of the order. On the 9th of November, 1846, the petitioners' solicitor sent a letter to *Milnes* containing the following notification,—“ If I do not on Thursday next receive a communication from the official assignee that you have paid him the whole balance in your hands, and the interest thereon, I shall immediately apply to the Court of Review to compel you to pay the money, and that you may be removed from being assignee.”

On the 12th of November, 1846, a person called on behalf of *Milnes* at the office of the petitioners' solicitor, and represented that *Milnes* would be in Manchester on the following Tuesday, and would settle the matter. On the Tuesday *Milnes*, or some person on his behalf, called on the official assignee and offered a cheque on a bank

at Huddersfield, drawn by *Milnes* in favour of the official assignee, for 166*l.* 3*s.* 11*d.*, which the official assignee refused to accept, the cheque not being payable in Manchester or London, and the collection thereof being therefore attended with expense or risk of loss by post, and because the cheque was tendered as payment of the balance due to the estate from *Milnes*, though it did not amount to the balance and the interest and expenses ordered to be paid. The prayer was that *Milnes* might be ordered to pay into the hands of the official assignee the sum of 166*l.* 3*s.* 11*d.*, with interest thereon at the rate of 20*l.* per cent. for such time as the same shall have been by him retained; and also the sum of 30*l.* 10*s.* in pursuance of the order of the Commissioner, dated the 14th of July, 1846, and also all the costs of and incident to the application.

1847.

Ex parte  
CUNLIFFE  
and another.

Mr. *Bacon* and Mr. *Sargood* supported the petition.

Mr. *Bagshawe* for Mr. *Milnes*. The petitioners have no right to make this application; for it does not appear that any other creditors are dissatisfied with the assignee's conduct. The proper person to apply would be the official assignee, who would before he took any step ascertain the general feeling of the creditors at large. Mr. *Milnes* was not bound to obey the notice of any individual creditor. He was willing to pay what was due from him on being applied to by a proper person, as was manifested by his offering a cheque for the only amount claimed of him. For as to the 30*l.* 10*s.* he had not even received notice to pay that sum. The Commissioner's order is not correct in form; the statute 6 *Geo.* 4, c. 16, s. 104(a),

(a) 6 *Geo.* 4, c. 16, s. 104, enacts, "that if any assignee shall retain in his hands, or employ for his own benefit, or knowingly permit any co-assignee

1847.

Ex parte  
CUNLIFFE  
and another.

only making an assignee liable to be charged with such sum as shall be equal to interest at the rate of 20 per cent. on money retained by him, and not 20 per cent. per annum. And at all events this is not the proper tribunal to apply to, for by 7 & 8 *Vict.* c. 111, s. 19(a), the Commissioner has power to enforce his order for payment, and there can, therefore, be no occasion to incur the expense of an application to this Court.

*Mr. Bacon* in reply. There has been considerable doubt as to the extent of the power given to the Commissioner by the act of the 7 & 8 *Vict.* c. 111, as relates to the bankruptcies of individuals, the act professing in its title and preamble to relate only to the bankruptcy of public companies. And as, at all events, the act does not

so to retain or employ, any sum to the amount of 100*l.* or upwards, part of the estate of the bankrupt, or shall neglect to invest any money in the purchase of exchequer bills when so directed as aforesaid, every such assignee shall be liable to be charged in his accounts with such sum as shall be equal to interest at the rate of 20 per cent. on all such money, for the time during which he shall have so retained or employed the same, or permitted the same to be so retained or employed as aforesaid, or during which he shall have so neglected to invest the same in the purchase of exchequer bills; and the Commissioners are hereby required to charge every such assignee in his accounts accordingly."

(a) 7 & 8 *Vict.* c. 111, s. 19, enacts, "that if any person shall disobey any rule or order of the Court authorized to act in the prosecution of any fiat in bankruptcy, duly made by such Court for enforcing any of the purposes and provisions of this act, or of any other act relating to bankruptcy or insolvency now or hereafter to be in force, or made or entered into by consent of such person, for carrying into effect any of such purposes or provisions, it shall and may be lawful for such Court, by warrant under hand and seal, to commit the person so offending to the Queen's Prison, or to the common gaol of any county, city or place where he shall be found, or where he shall usually reside, there to remain without bail or mainprize, until such person shall have fulfilled the duty required by such rule or order, or until such Court or the Lord Chancellor shall make order to the contrary."

take away the old and well-understood jurisdiction of this Court, creditors cannot be called upon to incur the responsibility of putting in force the somewhat doubtful and extraordinary powers newly given to the Commissioners. As to the mode of calculating the penalty of 20*l.* per cent., the 104th section of 6 *Geo.* 4, c. 16, makes it payable for the time during which the assignee shall have retained or neglected to invest the money, clearly showing that a gross payment of 20*l.* per cent. is not meant.

1847.

Ex parte  
CUNLIFFE  
and another.

The CHIEF JUDGE thought the question one of costs merely. The 20*l.* mentioned in the 104th section meant clearly, in his Honor's opinion, 20*l.* per cent. per annum. As, however, the recent act, 7 & 8 *Vict.* c. 111, had provided a less expensive and dilatory mode of proceeding than an application to this Court, his Honor did not think the practice ought to be encouraged of coming in such cases to this Court in the first instance. The Order must be for Mr. *Milnes* to pay the balance within a fortnight, and the petitioners might have their costs out of the estate.

1847.



Ex parte GEORGE WEBSTER, Sir PETER LAURIE, ANDREW SPOTTISWOODE, JOHN BARNES and JOHN WILLIAM SUTHERLAND.—In the matter of DANIEL WADE ACRAMAN, WILLIAM EDWARD ACRAMAN, and ALFRED JOHN ACRAMAN.

And also

In the matter of DANIEL WADE ACRAMAN, WILLIAM EDWARD ACRAMAN, ALFRED JOHN ACRAMAN, THOMAS HOLROYD, WILLIAM MORGAN, and JAMES NORROW-WAY FRANKLYN.

January 27 and  
February 2.

A firm of three partners agreed to make advances to a consignor upon certain terms as to commission, and as to a lien on the return proceeds of the shipments.

They accepted, on the faith of this agreement, bills drawn on them by the consignor; and on one of those bills approaching maturity, they requested the holders to give them an extension of time, which the latter agreed to do, on having the acceptance of a distinct firm of six, in which the three

THE petitioners were the trustees of the Union Bank of London.

The bankrupts *Daniel Wade Acraman, William Edward Acraman, and Alfred John Acraman*, carried on the business of merchants at Bristol in copartnership, under the firm of "*D. E. & A. Acraman*;" and they and the three other bankrupts carried on the business of manufacturing engineers, and manufacturers of anchors and chain cables, and ship builders, in copartnership at Bristol, under the firm of *Acramans, Morgan & Co.*

At the date of the fiat the petitioners were the holders for value of a bill of exchange for 3,026*l.* 6*s.*, dated the 12th day of March, 1842, drawn by the firm of *D. E. & A. Acraman* on, and accepted by, the firm of *Acramans, Morgan & Co.*, payable two months after

were also partners. A bill was accordingly drawn by the three, accepted on behalf of the six, and endorsed by the consignor, to whose credit it was carried by the holders of the former bill. Afterwards the holders were parties to an arrangement between the consignor and his creditors, whereby they released the consignor and the shipments from all liability in respect of the bills: *Held*, that they thereby discharged the firm of six.



date to the order of the firm of *D. E. & A. Acraman*, and which was accepted under the following circumstances:—

1847.

Ex parte  
WILKINSON  
and others.

Mr. *William Williams* was a general merchant at Bristol. He was also a member of a firm carrying on business as merchants in copartnership at Launceston in Van Diemen's Land, under the firm of *Williams, Campbell & Co.*; and was in the habit of shipping goods to the firm of *Williams, Campbell & Co.* through the firm of *D. E. & A. Acraman*. On the 7th of November, 1840, an agreement was made between Mr. *Williams*, on behalf of himself and the firm of *Williams, Campbell & Co.* on the one part, and the firm of *D. E. & A. Acraman* of the other part, to the following effect:—

“ Bristol, 7th November, 1840.

“ It is this day mutually agreed that the following shall form the basis for future transactions with the ports of Launceston, Van Diemen's Land, and Sydney, New South Wales, namely,—

“ 1st. That *William Williams* has liberty to ship merchandize to the above ports through *D. E. & A. Acraman*, on joint account of himself and *Williams, Campbell & Co.* of Launceston, to the extent of 26,000*l.* per annum in quarterly shipments.

“ 2nd. That *D. E. & A. Acraman* are to make advances quarterly to the extent of 2*s.* 3*d.* the amounts of said shipments as they take place.

“ 3rd. That the goods are to be consigned by *D. E. & A. Acraman* to *Williams, Campbell & Co.* of Launceston, or to *R. Campbell, junior & Co.* of Sydney, with the bills of lading in the name of *D. E. & A. Acraman*, who are to effect insurances for their security

1847.  
Ex parte  
WEBSTER  
and others.

for such advances on all outward shipments and returns, as well as on all homeward consignments, charging a commission of a quarter per cent. for the same.

"4th. and 5th. That certain commissions as therein mentioned should be received by the said *D. E. & A. Acraman* and *William Williams*.

"6th. That the whole of the proceeds of the said shipments are to be returned to *D. E. & A. Acraman*, on joint account of *William Williams* and *Williams, Campbell & Co.*, either in produce or bills at their option, on which the following commissions will be charged, viz. if a bill remittance 1 per cent.; if in produce  $2\frac{1}{2}$  per cent. on the gross proceeds, and 1 per cent. for the selling broker.

"7th. That on the receipt of the remittances, *D. E. & A. Acraman* shall be at liberty to first pay themselves the amount of their advances and charges, should they deem fit so to do, and then hand over surplus proceeds to *William Williams* and *Williams, Campbell & Co.*; it being understood that if the returns for shipment No. 1 are insufficient to pay *D. E. & A. Acraman* the amount of their advances, and should they desire the same, the returns of shipment No. 2 shall first be amenable to make good the deficiency in the returns of No. 1; and so on with all subsequent shipments and returns, although it will be very desirable, as far as practicable, that the returns for each shipment should be sufficient to close the same.

"8th. That *William Williams* shall be at liberty to draw against goods shipped, in addition to the £6,000l. worth alluded to in paragraph 1, in favour of *D. E. & A. Acraman*, upon *Williams, Campbell & Co.*, to the extent at least of 5000l. per annum, at different periods,

whenever this may be done advantageously, as regards the purchasing goods and settling the bills, and *D. E. & A. Acraman* charge a commission of 1 per cent. for negotiating the bills, the same being free from all other charges.

"9th. That if *Williams, Campbell & Co.* should deem it advisable to consign any part of their produce remittances to the order of *D. E. & A. Acraman* in London, they shall be at liberty so to do; but as the primary motive for entering into this business was to bring consignment of colonial produce to Bristol, that port should have the preference, except under very peculiar circumstances: of course all bill remittances must come direct to *D. E. & A. Acraman*.

"10th. It must be also clearly understood, that the realization of all outward and homeward shipments and returns, whether in bills or goods, are at the risk of *William Williams* and *Williams, Campbell & C.*, and that *William Williams* and *Williams, Campbell & Co.* are answerable to *D. E. & A. Acraman* for any deficiency, should such arise.

"11th. This agreement to come into operation on the 1st of January, 1841, or to commence from the next ship to follow the '*Dalius*,' the same being terminable by six months notice in writing by either party."

In pursuance of this agreement *Mr. Williams*, after the month of November, 1840, and up to and including the 2nd of August, 1841, consigned numerous shipments to the firm of *Williams, Campbell & Co.* at Launceston, through the firm of *D. E. & A. Acraman*, to the extent of 41,574*l.* 17*s.* 3*d.* The last-mentioned firm, however, did not advance any cash on the credit of the shipments,

1847.

Ex parte  
WEBSTER  
and others.

1847.

Ex parte  
WEBSTER  
and others.

but instead of making such cash advances, accepted bills, drawn by Mr. *Williams* upon them, to the extent of 16,585*l.* 11*s.* One of such acceptances consisted of a bill for 3000*l.*, which was dated the 10th of December, 1841, and was drawn by Mr. *Williams* upon, and was accepted by, the firm of *D. E. & A. Acraman*, and was payable three months after date to the order of Mr. *Williams*, who indorsed the bill.

The petitioners discounted the bill for Mr. *Williams*, by paying to the credit of his banking account with them the full value thereof, after deducting legal discount.

On the 8th of March, 1842, the firm of *D. E. & A. Acraman* wrote and sent the following letter to the manager of the Union Bank :—

“ In consequence of disappointment in the receipt of some large sums, we regret being obliged to ask the favour of your allowing us to renew our acceptance favouring *William Williams* for 3000*l.*, due the 13th instant, for three months. Our manufacturing firm of Messrs. *Acramans, Morgan & Co.* have made an application to the Bank of England for a considerable loan, and that for a defined period, which we are happy to inform you has been favourably received, and which now only awaits ratification by the necessary forms and conditions required by the Bank. Having fully entered into a process which will necessarily take up some time for its completion, we shall therefore esteem it a favour if you will kindly meet our wishes in the way proposed, for the cogent reasons assigned by us, satisfied as we are that we shall be in every way prepared to honour our fresh acceptance at its maturity.”

The manager of the Union Bank, by a letter dated

the 9th March, 1842, informed Messrs. *D. E. & A. Acraman* that the request could not be acceded to; and on the 10th of March, 1842, the last-mentioned firm sent another letter to the manager as follows:—

1847.  
  
 Ex parte  
 WEBSTER  
 and others.

“Your favour of yesterday's date is to hand, and as our motive for addressing you on the previous day was to crave an extension of time, so that our acceptance might not be returned during the pending negotiations with the Bank of England, we trust on your reconsidering the matter, that such a reason will sufficiently explain to you the justification of our application to your bank. We shall be most happy to place in your hands a letter from Messrs. *Acramans, Morgan & Co.*, guaranteeing the payment of our renewed acceptances, immediately they have completed their arrangements with the Bank of England, even though they should not have arrived at maturity.”

In reply to this letter, the manager of the Union Bank on the 11th of March, 1842, wrote as follows:—

“By your letter of the 10th inst., you appear to have driven yourselves in a corner, as your acceptance due on the 13th is payable to-morrow; I have however submitted your application to our daily Committee of Directors, and I am instructed to inform you, that on Mr. *Williams* forwarding to me the acceptance of your firm, Messrs. *Acramans, Morgan & Co.*'s draft, at two months date, for the amount of your bill, now nearly due, accompanied by Mr. *Williams*' authority for me to debit his account with this bill, and an undertaking from Messrs. *Acramans, Morgan & Co.*, to apply the first monies that may be received from the Bank of England, should the pending negotiations with that institution be effectuated, to the liquidation of our claims, although not at maturity;

1847.

Ex parte  
WEBSTER  
and others.

the new bill will be placed to his credit, subject to these conditions. I will forbear presenting your bill due to-morrow, till near 5 o'clock, to give you the opportunity of perfecting this arrangement by sending up per railway."

On the 12th of March, 1842, Messrs. *D. E. & A. Acraman*, drew a bill for 3,026*l.* 6*s.*, dated upon that day, and the same was accepted by one of the Messrs. *Acraman*, in the name of Messrs. *Acramans, Morgan & Co.*, payable two months after date to the order of the Messrs. *D. E. & A. Acraman*, and was indorsed by Messrs. *D. E. & A. Acraman* and by Mr. *Williams*; and on the same 12th of March, 1842, Messrs. *D. E. & A. Acraman* sent the bill enclosed in a letter, together with a letter dated the 12th of March, 1842, from Messrs. *Acramans, Morgan & Co.* to the manager of the Union Bank as follows:—

"We hereby undertake to apply the first monies we receive from the Bank of England, should our pending negotiations with that institution be effectuated, to the liquidation of our acceptance in favour of Messrs. *D. E. & A. Acraman*, for 3,026*l.* 6*s.*, due the 15th May next, whether it be due or not."

On the same day, Mr. *Williams* wrote to the manager of the Union Bank as follows:—

"I beg to hand you, inclosed, Messrs. *D. E. & A. Acraman's* draft upon Messrs. *Acramans, Morgan & Co.*, at two months, for 3,026*l.* 6*s.*, which you will please place to the credit of my account, and debit me with the bill due the 13th for same amount, or rather 3000*l.*"

On receiving the bill for 3,026*l.* 6*s.*, the amount of the bill for 3000*l.* was carried to the debit of Mr. *Williams*

with the Union Bank, and he was credited with the amount of the bill for 3,026*l.* 6*s.*

Early in April, 1842, the two firms of *D. E. & A. Acraman*, and *Acramans, Morgan & Co.* suspended payment, and divers attempts were made to wind up the affairs of the two firms by means of a trust deed. These having failed, the fiat was issued in June, 1842, and different official and creditors' assignees were appointed of the two firms.

Mr. *Williams*, in addition to his liability in respect of the acceptances of Messrs. *D. E. & A. Acraman*, was indebted to divers other persons, and was indebted to Messrs. *D. E. & A. Acraman* in a cash balance of 3,389*l.*, exclusive of the bill, and in respect of which cash balance, as well as of the bills, the assignees of Messrs. *D. E. & A. Acraman* claimed a right of lien upon the shipments from Van Diemen's Land.

On April 5, 1843, *Williams* entered into an agreement in writing with his creditors, and on August 2nd, 1843, an indenture, dated on that day, was duly made and executed by and between the creditors mentioned in two schedules thereto annexed of the first part, *W. Williams* of the second part, and *Robert Campbell* of the third part; and thereby, after reciting that *Williams* was indebted to the said several persons whose names or firms were set forth in the first schedule thereto on several bills of exchange, in respect of which the late firms of *D. E. & A. Acraman* and *Acramans, Morgan & Co.*, or one of them, became also liable in the several sums of money set opposite to their respective names or firms in the same schedule, and that he was indebted to the several persons whose names or firms were set forth in the second schedule thereto, in the several sums of money set opposite to

1847.

Ex parte  
WEBSTER  
and others.

1847.

Ex parte  
WEBSTER  
and others.

their respective names or firms in the said schedule; and that by articles of agreement, bearing date the 5th April, 1843, and made between the said *William Williams* of the one part, and the several persons whose names or firms were thereto subscribed of the other part, after reciting that the said *William Williams* was justly and truly indebted to the several persons or firms mentioned and set forth in the first and second schedules thereto, in the several sums set opposite their respective names, which said respective debts he was unable to pay in full, and that the said several respective creditors whose names or firms were set forth in the first schedule thereto were the holders of bills of exchange, upon which one or both of the late firms of *D. E. & A. Acraman* and *Acramans, Morgan & Co.* were liable, as well as the said *William Williams*, and as such owners thereof they claimed a preferable right to have the proceeds of certain shipments, in respect of which the said bills were drawn or made, applied towards the payment thereof, and that the said *William Williams* was also indebted to *Edward Mant Miller*, *Robert Castle* and *Thomas Tyson*, as assignees of the estate and effects of the said *Daniel Wade Acraman*, *William Edward Acraman* and *Alfred John Acraman*, lately trading under the said firm of *D. E. & A. Acraman*, in a cash balance, or sum of £3,389*l.* exclusive of the said bills of exchange, and the said assignees also claimed a right of lien upon the said shipments, and that with the view of settling with the said several creditors parties thereto, the said *William Williams* had proposed, and it had been agreed that such of the said several creditors of the said *William Williams* parties thereto, whose names were set forth in the first schedule thereto, (including the said assignees of



the estate and effects of the said *Daniel Wade Acraman*, *William Edward Acraman* and *Alfred John Acraman*, bankrupts,) should accept and take from the said *William Williams* a composition of 4s. 6d. in the pound, in full satisfaction and discharge of their said respective debts, and of all such claim of lien as aforesaid; and that such of the said several creditors of the said *William Williams* parties thereto, whose names or firms were set forth in the second schedule thereto, should accept and take from the said *William Williams* a composition of 3s. in the pound, in full satisfaction and discharge of their said respective debts, to be payable at the time and in the manner hereinafter mentioned: It was thereby witnessed, and the said several creditors of the said *William Williams* parties thereto did thereby for themselves severally and respectively, and for their several partners, executors, administrators and assigns, but not the one for the other or others of them, promise and agree to and with the said *William Williams*, his executors and administrators, in manner following, that is to say: That they the said several creditors parties thereto, whose names or firms are contained in the first schedule thereto, should and would accept and take from the said *William Williams* a composition of 4s. 6d. in the pound, in full satisfaction of their said respective debts and claims of lien, and that they the said creditors parties thereto, whose names or firms were contained in the second schedule thereto, should and would accept and take from the said *William Williams* a composition of 3s. in the pound, in full satisfaction and discharge of their said several debts, provided such composition should be paid to the said several creditors parties thereto within the space or time of twenty-eight days from the 24th of May then next: And further, that,

1847.

Ex parte  
WEBSTER  
and others.

1847.

Ex parte  
WEBSTER  
and others.

upon the payment of the said compositions respectively, they the said creditors parties thereto, and each and every of them, should and would, at the request and costs and charges of the said *William Williams*, duly execute and deliver to the said *William Williams*, his executors or administrators, a full, good and sufficient release and discharge from their said several and respective debts, and of and from all claims or demands whatsoever: And after reciting that the said agreement had determined by effluxion of time, and that it had been agreed between the said several persons, parties thereto of the first part, and the said *William Williams* and the said *Robert Campbell*, that the several persons whose names or firms were mentioned in the first schedule to the now stating indenture, should accept and take a composition of 3s. in the pound on the amount of their said debts mentioned in the same schedule, and that the said *Robert Campbell* should advance monies sufficient to discharge the said respective compositions; and that in pursuance of the said agreement on the part of the said *Robert Campbell*, he had paid to the said creditors of the said *William Williams*, parties thereto of the first part, the amount of their respective compositions on the amount of their said respective debts: And after reciting that by an indenture, bearing even date with the now stating indenture, and made or expressed to be made between the said *Edward Mant Miller*, *Robert Castle* and *Thomas Tyson*, as such assignees of the said firm of *D. E. & A. Acraman & Co.* of the first part, the said *William Williams* of the second part, and the said *Robert Campbell* of the third part, they the said *Edward Mant Miller*, *Robert Castle* and *Thomas Tyson*, as such assignees as aforesaid, had assigned unto the said *Robert*

*Campbell*, his executors, administrators and assigns, all the rights of lien and claim and demand at law and in equity of them the said assignees, of, in and to the several shipments, goods and debts therein mentioned, To hold, receive and take the same unto the said *Robert Campbell*, his executors, administrators and assigns, for his and their absolute use and benefit: It is witnessed by the now stating indenture, that in pursuance of the said recited agreement on the part of the said creditors of the said *William Williams*, parties thereto of the first part, and in consideration of the premises and of the compositions on their said debts to them respectively paid by the said *Robert Campbell*, as they the said several persons parties thereto of the first part did thereby respectively acknowledge, they the said several persons parties thereto of the first part (and especially the said several persons parties mentioned in the first schedule thereto) did thereby for themselves respectively, and their several and respective partners, acquit, release, and for ever discharge the said *William Williams*, his heirs, executors and administrators, and his and their lands and tenements, goods and chattels whatsoever and wheresoever, and also the said *Robert Campbell*, his executors and administrators, and also all the proceeds of the said shipments mentioned or referred to in the said articles of agreement of the 5th day of April, 1843, and of and from all and all manner of action and actions, suits, right or benefit of lien, bills, bonds, writings, obligations, debts due, duties, accounts, sum and sums of money, judgments, executions, extents, claims and demands whatsoever, both at law and in equity, or otherwise howsoever, which against the said *William Williams*, his heirs, executors or administrators, or his or their

1847.

Ex parte  
WEBSTER  
and others.

1847.

Ex parte  
Wheeler  
and others.

estate or effects, or against the said *Robert Campbell*, in respect of the said right of claim and demand, so assigned to him as aforesaid, they the said several creditors parties thereto of the first part, or their respective partners or any or either of them, then had or might thereafter have claim, challenge or demand for, or by reason or means of all or any of the debts to them the said several parties thereto of the first part, or to them and their respective partners or partner respectively due or owing from or by the said *William Williams*, or any interest, exchange or commission due or demandable for or on account of the same, or any other matter, cause or thing whatsoever, up to the date of the now stating indenture.

The indenture was executed by various creditors, including the assignees of the late firm of *D. E. & A. Acraman*, who executed it in respect of the debt of 3,389*l.*, and was also executed on behalf of the petitioners by their manager, in respect of their claims under the bill of exchange in question; and the petitioners received the composition on the amount of their claims.

The petitioners now sought leave to prove the full amount of the bill for 3,026*l.* 6*s.* against the joint estate of *Acraman, Morgan & Co.*, without making any deductions in respect of the composition of 4*s.* 6*d.* in the pound.

In opposition to the petition, the bankrupt *Morgan* deposed, that the concerns of the two firms were altogether separate and distinct, and that he and his partners, Messrs. *Holroyd & Franklyn*, never had any connection with, or interest whatever in, the firm of *D. E. & A. Acraman*, or in the business thereof; and that as the business of each of the firms was very extensive, the fact that the concerns of the two firms were altogether separate and distinct was notorious not only in Bristol,

but also in London and elsewhere, and was well known to all persons having dealings with the two firms or either. That the bill of exchange for 3,026l. 6s. was, as to the body thereof, in the handwriting of a clerk of the firm of *D. E. & A. Acraman*, and which clerk was not in the service of, nor in any way employed by, the firm of *Acramans, Morgan & Co.*; and that the signature of *D. E. & A. Acraman* to the bill as the drawers thereof was in the handwriting of *Alfred John Acraman*, and the acceptance on the bill, purporting to be an acceptance by *Acramans, Morgan & Co.*, was in the handwriting of *William Edward Acraman*. That such acceptance was given without any authority from the firm of *Acramans, Morgan & Co.*; and that such acceptance was never in any manner recognized by that firm. That no application or inquiry either by letter or otherwise was ever made by or on behalf of the Union Bank of London, or of the petitioners, or of their manager, to the firm of *Acramans, Morgan & Co.*, or to either of the partners in that firm who were not members of the other firm, respecting the acceptance of the bill of exchange or the guarantee, nor did any communication on the subject take place between the Union Bank or any person on its behalf with the firm of *Acramans, Morgan & Co.*, or, as the deponent believed, any of the last-mentioned partners thereof, nor did they or any of them promise or agree to give any such guarantee, or hear of it at any time before the petition was presented. That no such letter of guarantee, nor any copy or notice thereof, appeared in the letter book of the firm of *Acramans, Morgan & Co.*; and that at the time when the bill was accepted there was not any debt due or owing from the firm of *Acramans, Morgan & Co.* to the Union Bank of

1847.

Ex parte  
WHESTER  
and others.

1847.

Ex parte  
WEBSTER  
and others.

London, nor was any consideration given to the firm of *Acramans, Morgan & Co.* for the acceptance of the bill, nor was there any other ground or reason for the acceptance of any such bill by the firm of *Acramans, Morgan & Co.*, nor for the giving of any such guarantee as in the petition was mentioned; nor would such acceptance and guarantee, or either of them, have been consistent with the ordinary and regular course of business of the last-mentioned firm. And the witness deposed that no application was made to the last-mentioned firm for payment of the bill when it became due, and that no notice of the dishonour of the bill was given to Messrs. *Acramans, Morgan & Co.* That the firm of *Acramans, Morgan & Co.* were not in any manner parties to any of the transactions with Mr. *Williams* mentioned and set forth in the petition; and that no attempt was made by or on behalf of the petitioners or the Union Bank of London to prove the amount of the bill against the joint estate of *Acramans, Morgan & Co.* until the 19th of January, 1847, which was after the petition had been presented; but that on the 19th January, 1847, the petitioners attempted to prove the debt before Mr. Serjeant *Stephen*, who, in consequence of the petition having been presented to the Court of Review, declined to decide upon the matter.

Mr. *Russell* and Mr. *Bagshawe* in support of the petition. Admitting that the petitioners knew that the firm of six were only sureties for the firm of three, still it can not be said that they discharged the firm of three in any way by the arrangement which they entered into on winding up the affairs of *Williams*. The petitioners knew of no relation of suretyship between

*Williams* and any other parties. *Williams* was merely an indorser of the bill. How could any transaction with him affect the acceptors? All the petitioners have done is to discharge, with the concurrence of the drawers, a party who had become liable to the petitioners subsequently to the acceptance; but there is no pretence for saying, that such a transaction could discharge the liability of the acceptors. Even the release of the drawer himself of an accommodation bill by the holder, knowing at the time the acceptance to have been for accommodation only, will not discharge the acceptor. *Harrison v. Courtauld*(a). If it were necessary, evidence could be adduced to show that the firm of six were privy to, and concurred in, the arrangement with Mr. *Williams*.

1847.

Ex parte  
WHESTER  
and others.

Mr. *Swanston* and Mr. *Schoyn* for the assignees of Messrs. *Acramans, Morgan & Co.* In the first place, the evidence shows that the acceptance of the bill was not binding on Messrs. *Acramans, Morgan & Co.* The course of business was, for acceptances of that firm to be signed by their clerk, *G. Morgan*, by procuration, and it was well known that no bill was ever accepted by the firm otherwise; and moreover the petitioners had intrinsic notice that the transaction was one of suretyship, in which one partner could not bind the firm. They referred to *Green v. Deakin*(b), *Fisher v. Tayler*(c), *Ex parte Bonbonus*(d), *Ex parte Agace*(e), *Shirreff v. Wilks*(f), and *Ridley v. Taylor*(g). Assuming, however, the act of the partner to bind the firm of six, still

(a) 3 B. & Ad. 36.

(b) 2 Starkie, 347.

(c) 2 Cox, 312.

(d) 8 Ves. 540.

(e) 2 Hare, 218.

(f) 1 East, 53.

(g) 13 East, 178.

1847.

Ex parte  
WILKINSON  
and others.

their liability was discharged by the act of the petitioners in releasing *Williams* and the shipments, *Williams* being either the principal debtor, or, at all events, a party liable in priority to Messrs. *Acramans, Morgan & Co.*; and it being established in this Court, whatever may be the state of the authorities elsewhere, that the circumstance of a party appearing on the face of a bill in the character of acceptor is not conclusive. *Ex parte Glendinning (a)*, *Ex parte Wilson (b)*. The firm of three gave to the petitioners the security of the firm of the six at the solicitation of the petitioners who required that security, and knew it was afforded for accommodation only. In *Harrison v. Courtauld* the holder did not know when he took the bill that the acceptance was given for accommodation, a distinction which will alone reconcile this case with *Ex parte Glendinning*.

Mr. *Bacon* and Mr. *Roxburgh* for the assignees of the firm of *D. E. & A. Acraman & Co.*

Mr. *Russell* in reply.

THE CHIEF JUDGE.—I assume for the purposes of the argument, but without deciding,—it being in the view which I take of the case not necessary to decide,—that the acceptance in the name of the six bound the six as between them and the petitioners. Assuming that it did, the petitioners were by the nature of the transaction apprised that the name of the firm of six was used for the purpose and on the account of the firm of three, in effect and substance, by way of suretyship.

It appears that the bill had its origin in a transaction

(a) Buck, 517.

(b) 11 Ves. 412.



between Mr. *Williams* and the firm of three, in the course of which it became the duty of the firm of three, as between that firm and Mr. *Williams* in the first place (whatever might be the ultimate result of the accounts between them), to pay the bill, although the bill when paid would be only an item in the account between them; and although upon the whole account it might turn out that the firm of the three were creditors of Mr. *Williams*. There were also grounds on which the firm of the three had at least a probable, if not a certain, claim of lien to secure the debt which might appear due from Mr. *Williams* to the firm of the three.

In this state of things, all the partners of the firm of the six became bankrupt, and different assignees were chosen of the effects of the firm of three and of the effects of the firm of six; the two firms have no assignee in common.

Mr. *Williams* then became embarrassed in his circumstances, and an arrangement was made between various creditors of *Williams*, including the petitioners (who had discounted the bill), the assignees of the firm of the three, and *Williams* himself. The result of this transaction was, that in respect of this bill *Williams* was released, and certain goods were released from all claims in respect of the bill. The consequence is, that an individual liability, and also certain funds which the firm of six might have required to be applied to exonerate them from their responsibility on account of the firm of three, were withdrawn from them. My opinion is, that the effect of the arrangement, assuming it to have been made without the assent of the assignees of the firm of six, and with the knowledge, on the part of the petitioners, of the manner in

1847.

Ex parte  
WEBSTER  
and others.

1847.

Ex parte  
WEBSTER  
and others.

which the firm of the six was associated with the transaction, did discharge the estate of the six.

It is, however, urged, that although upon the present evidence, as is my opinion, the assignees of the six do not appear to have concurred in the arrangement to which I have referred, yet that proof can be adduced that they in fact did concur.

I am of opinion, that ample notice has been given to enable the petitioners to bring forward such a case, if it exist; and the object being to charge mere sureties, I think, especially under the circumstances in which this contract of suretyship originated, that I ought not to give an opportunity of adding to the evidence on this occasion, but should leave the petitioners to bring forward a new case upon a new petition, and dismiss the present petition with costs as against the assignees of the six.

Ex parte HENRY BOSANQUET and THOMAS FARNCOMB.—In the matter of JOHN BOYD and JAMES BOYD;

and

In the matter of WILLIAM HENRY WILSON and RICHARD VAUSE.

Westminster,  
January 27.

One of two partners procured the discount of a promissory note of the firm, on an agreement for a mortgage of shares belonging to the firm in certain ships and their freight, and of the policies of insurance effected by the firm on the shares. A mortgage deed was prepared, purporting to be made by both partners, but was only executed by the one. At the time of the execution of the deed, one of the ships was lost, but this fact was then not known to the parties: *Held*, that the security was binding on the firm, notwithstanding the execution of the deed by one partner only, and passed the insurance money, although the deed was not registered according to the shipping acts.

*Query*, whether insurance brokers have a lien on a policy effected by them for the general balance due from their principal.

of shares in certain ships and their freight, and the insurance monies payable in respect of a ship which had been lost at sea, and the prayer was for the usual order in the case of a mortgage security.

1847.

Ex parte  
BOSANQUET  
and another.

The bankrupts, who carried on business in copartnership as hop merchants and importers of guano, under the style of *John Boyd & Co.*, had in February, 1848, an account current with the Southwark Branch of the London and Westminster Bank. In that month *John Boyd*, who was the principal partner in the firm, applied on behalf of the firm to the said bank to discount their promissory note for 2500*l.*, offering to mortgage to the bank, as a security, certain ships and shares in ships and all the assurances effected thereon, all which property was part of the partnership effects.

The ships and shares of ships, so proposed to be mortgaged, were  $\frac{1}{2}$  shares of the *Margaret*,  $\frac{1}{4}$  shares of the *Exporter*,  $\frac{1}{4}$  shares of the *Fifeshire*, of all which shares *John* and *James Boyd* were joint registered owners; and  $\frac{1}{4}$  shares of the *Arab*, of  $\frac{3}{4}$  of which shares *John Boyd* was registered owner, and of  $\frac{1}{4}$  of which shares *James Boyd* was registered owner.

The bank acceded to the proposal, and directed Mr. *George Drew*, their solicitor, to prepare the mortgage security, which he accordingly did, sending the draft to Messrs. *Boyd* for their perusal. On the 5th of February, 1846, *John Boyd* called at Mr. *Drew's* office, and proposed some alterations in the draft, which were acceded to, and he then expressed a great wish to have the note discounted on that day, and signed a memorandum at the foot of the draft mortgage in the following words:

"We engage to execute a mortgage, in conformity with this draft, on the same being presented to us for that purpose.  
*John Boyd & Co.*"

1847.

Ex parte  
BOSANQUET  
and another.

Upon this memorandum being signed, Mr. *Drew* reported to the bank that they might discount the note, which was done on the 5th day of February, 1846. The draft was thereupon engrossed, and on the following day, being the 6th of February, *John Boyd* executed the deed, but on being asked where Mr. *James Boyd* was, and why he did not come to execute the deed, he answered, that *James Boyd* was in France, and would be back in a few days, and would then execute the deed.

By the mortgage, which was an indenture dated the 6th of February, 1846, and was expressed to be made between *John Boyd* and *James Boyd* of the one part, and the petitioner, *Thomas Farncomb*, of the other part, it was expressed to be witnessed that the bankrupts, according to their several and respective rights and interests, bargained, sold, assigned and set over to the petitioner, *Thomas Farncomb*, his executors, administrators and assigns, all those 48 undivided 64th parts or shares, and all and every other parts or shares, part or share, if any, of *John Boyd* and *James Boyd*, or either of them, of and in the said ship or vessel called the *Margaret*; and also all that the said ship or vessel called the *Exporter*; and also all those 32 and 16 undivided 64th parts or shares, and all and every other parts or shares, part or share, if any, of them the said *John Boyd* and *James Boyd* or either of them, of and in the ship or vessel called the *Arab*; and also all that the ship or vessel called the *Fifeshire*; and also all and singular, the masts, bowsprits, yards, gaffs, sails, anchors, chains and other cables, hawser, windlass, capstans, standing and running rigging, ropes, cords, cannons, cannonade, swivel and other guns, firearms and gunpowder, shot, artillery and ammunition, chain and other pumps, pro-

visions, stores, tackle, netting, boat-oars, boat-hooks, furniture, materials, steering-wheel, binnacle, compass, appendages and appurtenances whatever to the said four several ships or vessels, or parts or shares thereby assured or expressed and intended so to be, belonging or in anywise appertaining; and also all and every sums and sum of money to be had and recovered or obtained under or by virtue of all and every the insurances mentioned in the schedule thereunder written, or any other insurances already or thereafter to be effected on the said ships or vessels, or parts or shares respectively, or so much and such part thereof as the said *John Boyd* and *James Boyd*, or either of them, would, but for that indenture, have become entitled to, together with every policy and policies of assurance on the said four several ships or vessels, or on the freight or earnings thereof; and all and every charter-parties and charter-party, certificates of registry and certificate of registry, and other documents whatsoever in any way relating to the premises; and also all the right, title, interest, property, claim and demand whatsoever, both at law and in equity, of them the said *John Boyd* and *James Boyd* and each of them, in, to or out of the said ships or vessels and parts and shares of ships or vessels and the said freight, policies and premises hereby assured or expressed and intended so to be and every part thereof, To have, hold, take and enjoy all and singular the premises hereby assigned or expressed and intended so to be unto the petitioner, *Thomas Farncomb*, his executors, administrators and assigns, subject nevertheless to a proviso for redemption on payment by the persons or person for the time being so as aforesaid constituting the said firm of *John Boyd & Co.*, of the balance of the account current therein par-

1847.

Ex parte  
BOSANQUET  
and another.

1847.

Ex parte  
BOSANQUET  
and another.

ticularly specified, or for interest and commission or other lawful charges and expenses, and all other, if any, monies owing under or by virtue of that security, within two days next after a director, manager, clerk or other officer of the bank should have given to some person, by whom such sum of money might be paid, a notice in writing to pay the same for the time being so as aforesaid due and owing, and such other monies if any, or should have left such notice at the usual or last known place of abode, or of transacting business in England, of some person by whom such money might be paid.

The deed was duly registered on the 8th of April, 1846, in respect of the  $\frac{3}{4}$  shares of *John Boyd* in the *Arab*, but by reason of the non-execution of such indenture by *James Boyd*, the registration thereof, as to any of the other shares in the ships, was refused by the proper officer for registering the transfer of ships, although the registration of the deed in respect of such other shares was required on behalf of the bank.

Between the 6th of February and the 7th of the following April, Mr. *Drew* called repeatedly at the place of business of the bankrupts, in order to obtain the execution of the said deed by *James Boyd*, and was always informed that *James Boyd* had not yet returned from France, but was daily expected; and on the 7th of April Mr. *Drew*, having heard that *James Boyd* had arrived in London, went to him and tendered the deed for execution, but *James Boyd* refused to execute it, assigning as a reason for such refusal that their house was embarrassed.

On the 17th of April the petitioners filed their bill in chancery against *James Boyd*, praying that he might be ordered to execute the deed, and might be restrained

from assigning or parting with his interest in the ships agreed to be mortgaged, or any of them, to any other person; and the injunction was afterwards granted, the defendant having had notice of the application for the same, but not having opposed it.

On the 14th of April news arrived in England that the *Exporter* had been lost at sea before the day of the date of the mortgage; and it was discovered that *John Boyd* had deposited with the bank a copy only of the policy of assurance on that ship for 1000*l.*, the original being in the possession of Messrs. *Wilson* and *Vause*, brokers, who had effected the insurance on behalf of the bankrupts; and application was thereupon made, in behalf of the bank, to the Messrs. *Wilson* and *Vause* for such policy, and the premium and their commission was tendered to them, but they refused to part with it without being paid the general balance due to them from the bankrupts.

On the 17th of April notice was served, on behalf of the bank, on the underwriters of the policy for 1000*l.* on the *Exporter*.

The fiat issued on the 25th of May; and the act of bankruptcy, on which *John* and *James Boyd* were found bankrupts, took place on the 20th of May. The insurance brokers had also become bankrupt, and the petition was entitled in the matter of their bankruptcy.

Mr. *Russell* and Mr. *C. Hall* in support of the petition. The only questions are as to the want of registry of the mortgage of some of the shares, and as to the extent of the lien of the insurance brokers, whose assignees appear upon the present petition, and submit

1847.

Ex parte  
BOSANQUET  
and another.

1847.

Ex parte  
BOSANQUET  
and another.

their claims to the decision of the Court. The objection for want of registration does not of course apply to the insurance money, payable in respect of the *Exporter*, which was lost when the security was effected. As regards this money, the mortgage was in effect merely the assignment of a debt, and was not affected by the registration laws. Then as to the claim of the brokers, it has never been held that the lien of agents effecting a policy extends beyond their charges in respect of the policy on which the lien is claimed.

Mr. *Lewis* and Mr. *J. V. Prior* for the assignees of Messrs. *Boyd*. The mortgage deed was not binding on the firm, being only executed by one partner, who could not bind his partner by deed. *Harrison v. Jackson* (a). [The *Chief Judge*.—But there was a contract previously to the execution of the deed.] That contract, we submit, must have merged in the contract expressed by the deed, and the latter contract must, as the deed was executed by one partner alone, be considered as his contract only and as only affecting his own interest. But even assuming that the contract would bind the firm, still, as regards the shares of which the mortgage is unregistered, the security is void. Nor can the proceeds of the policy be in a different condition, because it was not known at the time that the ship was lost, and the policy was only assigned as incidental to the assignment of the ship itself; and as the latter assignment was void, the incidental assignment was also invalid. They cited *Irving v. Richardson* (b); *Powles v. Innes* (c).

(a) 7 T. R. 207.

(b) 2 B. &amp; Ad. 193.

(c) 11 Mees. &amp; Wels. 10.



The CHIEF JUDGE said, that, with regard to the three policies on the *Exporter*, that ship was at the time of the contract converted into a debt from the underwriters, which passed by the security. As to the objection that the security being effected by a deed executed by one partner could not bind the firm, it might be true that the instrument would not take effect as the deed of the firm, but the transaction itself was one within the authority of the partner, and the circumstance of a deed being executed would not invalidate the contract. There remained the question, as to the lien of the brokers on the proceeds of the policy.

1847.

Ex parte  
Bosauquet  
and another.

On this day,

February 2.

Mr. C. P. Cooper and Mr. Daniel, for the assignees of the insurance brokers, contended that there was, on behalf of their estate, a lien for their general balance upon the proceeds of the insurance.

Mr. Russell in reply. Parke on Insurance 801, (8th edit. by Hildyard); *Kruger v. Wilcox* (a); *Godin v. London Assurance Company* (b); *Snook v. Davidson* (c); and *Mann v. Forrester* (d), were cited.

The CHIEF JUDGE declined deciding the question of lien without the opinion of a court of law, and the terms on which an action was to be brought to determine the point were then settled.

The Order declared, that the petitioners had an equitable lien or security upon the  $\frac{3}{4}$  shares of

(a) Amb. 253.

(c) 2 Campbell, 218.

(b) 1 Burr. 490.

(d) 4 Campbell, 60.

1847.

Ex parte  
BOSANQUET  
and another.

the ship *Arab*, and that the petitioners had an equitable lien or security upon the policies on the ship *Exporter* and the proceeds thereof; and the usual accounts were directed of what was due to the petitioners upon their security, with the usual directions for the sale of the  $\frac{3}{4}$  shares in the *Arab*, and for the application of the proceeds. And it was ordered, that the petitioners and the assignees of Messrs. *Boyd* should commence an action in the Court of Common Pleas, for the purpose of ascertaining the right of the assignees of the insurance brokers to retain possession of the policy effected by them for 1000*l.* on the *Exporter*, on behalf of Messrs. *Boyd*; and certain admissions were directed to be made in the action, and the rest of the petition was ordered to stand over till after judgment in the action, with liberty to apply.

Ex parte JOHN HOLTHAM BAYLIES and  
JAMES STRINGER.—In the matter of WIL-  
LIAM GIBBS.

February 2.

The place of  
business of the  
bankrupt was in  
a town, situated  
partly in one  
county and  
partly in ano-  
ther, but was  
actually in the  
one of the two  
counties be-  
longing to the  
more remote  
district court:

**THIS** was the petition of two creditors to have transferred to the District Court of Birmingham a fiat which was directed to the Court at Bristol. The bankrupt was a butcher and baker at Welford, which is partly in the county of Warwick and partly in the county of Gloucester; the former of which counties is in the Birmingham district, and the latter in the Bristol

*Held*, that the fiat ought not to be transferred on this account to the nearer court.

district. The part of the parish of Welford which is in Gloucestershire, is bounded by land in that county to the extent of five miles; while the part which is in Warwickshire, is bounded by land in that county to the extent of nine miles. The bankrupt's place of business was about twenty-three miles from Bristol and seventy-two from Gloucester, but was actually situate in Gloucestershire. The fiat issued on December 15, 1846, and the petition was forthwith presented, and was served on the bankrupt before the 20th, before any sitting had taken place under the fiat. Assignees had not yet been chosen.

1847.  
~~~~~  
Ex parte  
BAYLIS  
and another.

Mr. *Bagshawe* in support of the petition. Nothing material has yet taken place under the fiat, not even the adjudication, which stands over for further evidence as to the petitioning creditor's debt. No inconvenience can arise from changing the venue to the forum to which it properly and reasonably belongs.

The CHIEF JUDGE.—The proper authority has appointed that part of Welford should be in one jurisdiction, and part in another. The consequences of this must be considered to have been known when it was done; and the Court cannot interfere without some other ground.

Mr. *Sidney Smith*, for the respondents, said that the majority in number and value of the creditors, as well as the petitioning creditor and the bankrupt, were in favour of the existing venue.

The CHIEF JUDGE.—The fiat ought properly and

1847.

Ex parte  
BAYLIS  
and another.

regularly to remain where it is, and the petitioning creditor and the bankrupt are for keeping it where it is, as are also the majority of creditors in number and value. The investigation of the petitioning creditor's debt has already commenced. I do not think that I ought to interfere.

Petition dismissed.

Ex parte HEMBERY.—In the matter of GEORGE  
AUGUSTUS CAVENDISH.

February 2.

*Quere*, whether the bill of costs of the solicitor of the petitioning creditor is payable without reserving sufficient to pay the office fees of 10*l.* and 20*l.* payable in the event of assignees being chosen, no creditor having proved, and the bankrupt having obtained his certificate.

**THIS** was the petition of the solicitor who sued out the fiat, praying for payment of his bill of costs.

The fiat issued on August 13, 1846.

On the 20th an official assignee was appointed.

On the 29th a sitting was held for the choice of assignees, but no creditor attended, and the sitting was adjourned to October 2, when several creditors proved but no assignees were chosen. At this sitting the bankrupt passed his last examination.

On November 5 the bankrupt obtained his certificate.

The assets amounted to 43*l.* 6*s.*, out of which the charges of the official assignee and the messenger were paid, amounting to 22*l.* 7*s.* The remainder was paid into the bank, to the credit of the Accountant in Bankruptcy, to the account of the bankruptcy.

Mr. *Forster* supported the petition, and cited *Ex*

*parte Paterson (a), Ex parte Parsons (b), and Ex parte Buchanan (c).*

1847.

Ex parte  
Hemery.

The CHIEF JUDGE.—Mr. *Ayrton* informs me, that the Lord Chancellor has intimated an opinion that the amount of the office fees ought to be reserved in cases like the present. In several recent cases I have acted upon a different construction of the sections of the statute under which the fees in question are payable, being of opinion that a fiscal regulation ought not to be interpreted in favour of the treasury, where such an interpretation is not plainly according to the clear meaning of the language used. But after the intimation, which I understand to have been given, of the opinion entertained by the head of the Court, I think it more proper and convenient not to decide against that opinion.

The petition was dismissed, and the case having been afterwards argued before the Lord Chancellor, now awaits his Lordship's decision. Several other cases involving the same point have, in the meantime, been ordered to stand over.

(a) *Ante*, p. 158.

(b) *Ante*, p. 342.

(c) *Ante*, p. 345.

Ex parte THOMAS BENBOW.—In the matter of  
THOMAS BENBOW.

February 10, 16  
and 22.

THIS was the bankrupt's petition to annul the fiat for want of an act of bankruptcy, that relied upon being the failure to pay or secure a debt after affidavit filed, under taken notion, taken an affidavit of debt (as a master extraordinary in Chancery) to serve as the foundation of an act of bankruptcy, and appeared upon a petition to annul the fiat, and submitted to the jurisdiction of the Court, he was ordered to pay the costs of annulling the fiat.

Where a  
country solicitor,  
admitted as a  
solicitor of the  
Court of  
Review, had,  
under a mis-

1847.  
~~~~~  
Ex parte  
BENBOW.

1 & 2 Vict. c. 110, s. 8. On referring to the affidavit, it purported to be sworn before a master extraordinary in Chancery, but the solicitor who signed the affidavit in that character had never, in fact, been appointed a master extraordinary.

The CHIEF JUDGE directed the petition to stand over, and notice to be served upon the solicitor who had so acted, that he might, if he thought fit, offer some explanation of his conduct.

On the petition coming on again to be heard accordingly, the solicitor filed an affidavit, stating that he had acted under a mistaken notion that his admission as solicitor of the Court of Chancery qualified him to act as master extraordinary.

Mr. *Bacon* and Mr. *Elmsley* for the petitioner said, that the petitioning creditor now consented to have the fiat annulled, and to pay 100*l.* for the petitioner's costs.

The *Chief Judge* asked what the solicitor said before whom the affidavit had been sworn.

Mr. *Russell* appeared for the solicitor, and offered to make such reparation as the Court thought fit for the error into which he had fallen, merely requesting that a reasonable time might be allowed him for that purpose.

Mr. *Swanston* and Mr. *W. W. Cooper* appeared for the petitioning creditor.

The official assignee was served with the petition but did not appear.

1847.

Ex parte  
BENBOW.

The Order was, that the fiat should be annulled, if the Lord Chancellor thought fit; and that the petitioning creditor should pay to the petitioner his costs of and occasioned by the application and annulling of the fiat, except so far as such costs were increased by affidavits filed by the petitioner as to any other matter or matters than the absence of an act of bankruptcy to support the fiat, and so far as any costs had been so increased by any such affidavits, it was ordered that the amount thereof be paid by the petitioner to the petitioning creditor; and it was ordered, that the one set of costs be set off against the other, and the balance duly paid; and in taxing such costs, the affidavit of the petitioning creditor purporting to have been sworn on the 30th day of January, 1847, before the solicitor, was to be considered as having been filed with reference to the act of bankruptcy. And the solicitor, by his counsel, submitting thereto, it was ordered, that he should, within two calendar months after the costs should have been taxed, pay to the petitioning creditor the sum or balance of costs which the petitioning creditor should pay to the petitioner under the order. And it was with the like consent ordered, that the solicitor should pay to the petitioning creditor the costs properly incurred of suing out and prosecuting the fiat, and his costs of and occasioned by the applica-

1847.

Ex parte  
BENBOW.

tion, except such costs as were thereinbefore ordered to be paid to the petitioning creditor by the petitioner.

Ex parte THOMAS SOMERS COCKS the Elder, ROBERT BIDDULPH, THOMAS SOMERS COCKS the Younger, ORMUS BIDDULPH, and REGINALD THISTLETHWAITE COCKS.—  
In the matter of JACKSON BARWISE.

February 22.

Where a bill of exchange was dishonoured by the acceptor, and actions were brought by the holder against the drawer as well as the acceptor, and the former became bankrupt after judgment signed and a reference to the master to see what was due and to tax costs, and afterwards the acceptor paid the amount due on the bill: *Held*, that the holder could prove for the costs.

**THIS** was a petition complaining of the rejection of a proof, and praying that the dividend might be stayed.

The petitioners, who were holders of a bill of exchange drawn by the bankrupt and dishonored by the acceptor, had brought an action in the Court of Exchequer against the bankrupt to recover from him the sum of 40*l.* and interest due upon the bill.

On the 17th of July, 1843, the petitioners signed judgment in the action for want of a plea, and on the 19th of the same month obtained a rule, whereby it was referred to the master of the Court of Exchequer to see what was due to the plaintiffs in the action for the principal and interest upon the bill, and also to tax the plaintiff's costs; and it was ordered, that the plaintiffs should be at liberty to sign final judgment thereon without executing a writ of inquiry of damages.

In pursuance of this rule, the master of the Court of Exchequer found the principal and interest due on the bill to be 40*l.* 3*s.* 7*d.*, and taxed the plaintiffs' costs of the action at 11*l.* 19*s.* 5*d.*; and on the 21st of July, 1843, final judgment was signed against the bankrupt in the



action for 40*l.* 3*s.* 7*d.*, and also for 11*l.* 19*s.* 5*d.* costs, making together 52*l.* 3*s.*

On the 20th of July, 1843, however, the fiat issued, and before the first meeting for proof of debts, the acceptor of the bill, against whom an action had also been commenced by the petitioners, paid them the amount of principal and interest due upon the bill, by means whereof the sum of 11*l.* 19*s.* 5*d.*, the amount of the costs of the first action, only remained due in respect of the bill from the bankrupt's estate.

The petitioners, at a dividend meeting held on the 30th of January, 1847, at which a final dividend was declared, tendered a proof for 11*l.* 19*s.* 5*d.*, the amount of the costs; but the Commissioner disallowed the proof on the ground that under the circumstances the amount of the costs was not provable.

Against this decision the present petition was an appeal

Mr. *Amphlett* in support of the petition. By the 58th section of 6 *Geo.* 4, c. 16, it is provided, that if any plaintiff in any action at law, or suit in equity, or petition in bankruptcy or lunacy, shall have obtained any judgment, decree or order against any person who shall thereafter become bankrupt, for any debt or demand in respect of which such plaintiff or petitioner shall prove under the commission, such plaintiff or petitioner shall also be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy. And in an early case after the passing of the act, *Ex parte Poucher* (a), it was decided, that where the verdict

1847.

Ex parte  
Cocks  
and others.

(a) 1 G. & J. 385.

1847.  
  
*Ex parte*  
*Cocks*  
 and others.


is before the bankruptcy in an action on a contract the costs are provable, although judgment is not signed until after the bankruptcy. The Vice-Chancellor (Sir *John Leach*) there said, " It seems to me, upon authority as well as upon principle, that where in an action founded upon contract there is a verdict before bankruptcy and judgment afterwards, there the costs *de incremento* are provable, having in effect been incorporated with the existing debt by the verdict, though not ascertained in amount till the judgment; and that, notwithstanding the case of *Longford v. Ellis* (a), which is indeed opposed by that of *Walker v. Sherlock* (b), there is in this respect a distinction between a verdict in tort and a verdict in contract, that in tort there is no debt whatever with which the costs can be incorporated until the judgment." A stronger authority still, if one were required, is *Ex parte Helm* (c). In that case the petitioners had commenced an action of assumpsit against the bankrupt for 840*l.* for the use and occupation of a farm and premises. The cause came on for trial in March, 1826, when a verdict for a nominal sum was taken by consent, subject to a reference; and the costs of the action were to abide the event of the award, and were to be paid on the 24th of June then next ensuing, and the costs of the reference were to be in the discretion of the arbitrators. On the 8th of April, 1826, the act of bankruptcy was committed, and the commission issued on the 22nd. On the 28th of April the arbitrators made their award, determining 624*l.* to be due to the petitioners for rent and 70*l.* to the bankrupt for repairs; and directing that the petitioners

(a) Cited 11 Ves. 652

(b) Cited 3 Wils. 270, 272, and 11 Ves. 651.

(c) Mont. & M'Ar. 70.

should be at liberty forthwith to enter a verdict for 554*l.* 18*s.* 10*d.*, and the costs of the reference and award were to be paid by the parties in moieties. The arbitrators further directed, that if the bankrupt should make default in payment of the 554*l.* 18*s.* 10*d.* as there mentioned, viz. a portion on May 2, the costs of the action on June 24, and 312*l.* 9*s.* 5*d.*, together with his moiety of the costs of the reference and award, on the 2nd day of November then next, it should be lawful for the petitioners from and after any such default to enter up final judgment against the bankrupt for the whole or either of the said several sums of money, as the same might then remain due, and to levy the amount in the usual way. Default was made in payment of all the sums awarded. The costs of the petitioners were taxed at 73*l.* 11*s.* 2*d.*; and final judgment was entered up for 554*l.* 18*s.* 10*d.* damages and 73*l.* 11*s.* 2*d.* costs, amounting together to 628*l.* 10*s.* The petitioners applied to prove this amount under the commission, but the Commissioners refused to admit the proof for costs. The Vice-Chancellor, however, directed the proof to be admitted, saying that *Ex parte Poucher* (a) removed all doubt upon the subject. In *Scott v. Ambrose* (b) the creditor had obtained judgment after the bankruptcy of the debtor, who obtained his certificate and then brought a writ of error, which was *non-prossed* for want of assignment of errors, and costs of *non pros* in error were awarded, amounting to 40*l.* The Court of King's Bench held that even those costs were barred by the certificate, as having relation to the original debt.

1847.  
  
*Ex parte*  
*Cocks*  
 and others.

Mr. *Swanston* for the assignees. There is no instance

(a) 1 G. & J. 385.

(b) 3 M. & S. 326.

1847.

Ex parte  
Cocks  
and others.

of a proof for costs unascertained at the time of the bankruptcy being admitted, except as incidental to the proof of the debt itself. And it would be contrary to principle to admit such a proof; for a demand for costs does not arise by contract, but is in the nature of damages, and here they were unliquidated at the date of the fiat.

*The Chief Judge.*—Does not the principle of *Ex parte Poucher* apply?

*Mr. Swanston.*—It is difficult to reconcile that case with former authorities.

*The Chief Judge.*—The decision may perhaps seem more agreeable to natural than to technical justice.

*Mr. Swanston.*—But assuming it to be correct, both that case and *Ex parte Helm* (a) are perfectly distinguishable from the present, where the debt itself is not sought to be proved; for the cases cited proceed expressly upon the footing of the costs being incorporated with the debt, and cannot be authorities for admitting a proof for the costs alone.

*THE CHIEF JUDGE.*—This case seems to me to be governed by *Ex parte Poucher* (b), unless the circumstance that the debt, having here been paid from another quarter, has not been proved under the bankruptcy effectually distinguishes the two cases. I am, however, of

(a) Mont. & M'Ar. 70.

(b) 1 G. & J. 385.

opinion, that there is no substantial difference in principle, and I follow that authority not unwillingly.

1847.

Ex parte  
Cocks.  
and others.

The Order was, that the petitioners be allowed to prove for the 11*l.* 19*s.* 5*d.* claimed, and that the costs of both parties should be paid out of the estate.

Ex parte ISAAC COUSEN, JOSEPH COUSEN, WILLIAM MILTHORPE and CHARLOTTE his Wife, CHARLOTTE ELIZABETH MILTHORPE by the said WILLIAM MILTHORPE, her father and next friend, GEORGE ROGERS and MARIANNE his Wife.—In the matter of JAMES COUSEN, LUCY COUSEN and JOHN RICHARDBY COUSEN.

THIS was the petition of cestuis que trustent under a will, of which the bankrupt was trustee, for the appointment of new trustees in the place of the bankrupt *James Cousen*, and for leave to prove 2560*l.* in respect of a breach of trust.

February 22.

By the will, which was that of *Jane Richardby*, dated October 2, 1839, the testatrix devised certain freehold estates to the bankrupt *James Cousen*, his heirs and assigns, upon trust for her brother *James Richardby* during his life, with remainder to the bankrupt *Lucy Cousen* during her life, with remainders over, under which the petitioners were interested. And the testatrix directed her said trustee to lay out

Where bankrupts were entitled in possession to the income of some of the trust funds, of which one of the bankrupts was trustee: *Semble*, that the Court of Review can not appoint a new trustee without the assignees joining as petitioners.

1847.  
  
*Ex parte*  
*Cousen*  
 and others.

and invest on security 2000*l.*, the interest or annual produce of which was to be paid to the bankrupt *Lucy Cousen* for her life, and after her decease upon trusts in favor of some of the petitioners.

*James Richardby* had since died.

*Mr. Swanston* supported the petition.

*Mr. Stinton* appeared for *James Cousen* and *Lucy Jane Cousen*.

*Mr. Elmsley* appeared for the assignees.

The *Chief Judge*.—Can the Court appoint new trustees under the 79th section, without all the parties entitled in possession to the rents, issues and profits, or interest of the trust property, joining as petitioners? and if so, ought not the assignees here to be co-petitioners? I do not remember this point to have been raised before.

*Mr. Swanston*. As the bankrupt's life interest is subject to make good the breach of trust, it has probably been generally considered that the assignees are not interested within the meaning of the 79th section; *Ex parte Turpin* (a); *Ex parte Young* (b); *Ex parte King* (c).

THE CHIEF JUDGE.—It will be better merely to appoint some one to prove in respect of the breach of trust.

(a) *Mont.* 443.

(b) 2 *Mont. & Ayr.* 230; 4 *Dea. & C.* 652.

(c) 2 *Mont. & Ayr.* 417; 1 *Dea.* 155.

The Order was, that *Joseph Sutcliffe* should be at liberty to go in and make such amount of proof as he could establish; and that the dividends upon such proof should be invested in the name of the Accountant General in Bankruptcy, to the credit of the bankruptcy "the account of the legatees of *James Richardby* deceased;" and that the dividends thereupon should be accumulated. The petitioners' costs to come out of the dividends, and the assignees' costs out of the joint or separate estate, according as the proof should be made against the one or the other.

1847.

Ex parte  
Cousen  
and others.

Ex parte JANE OXTOBY.—In the matter of ROBERT OXTOBY and WILLIAM CHRISTOPHER OXTOBY.

THIS was the petition of the mother of a creditor, to whom the bankrupt was indebted on two promissory notes, praying that she might be at liberty to go in to prove on his behalf. The petition and the affidavit of the petitioner in support of it stated that the creditor had been suffering for two or more years from disturbed or weakened intellect, and was incapable of managing his own affairs or transacting any public business, and especially that he was not in a fit state of mind to understand the obligation of an oath. She further deposed, that she had for two years previously to the opening of the fiat acted as sole manager of his property and affairs.

March 1.

Mother of  
creditor of weak  
intellect per-  
mitted, on her  
application ex  
parte, to prove  
on his behalf.

Assignees had been chosen.

1847.

Ex parte  
OXFORD  
and others.

Mr. *Currey* appeared in support of the petition, which was not served on any one.

The Order was, that the petitioner might be at liberty to go in under the fiat, and tender and make such amount of proof as she could establish in respect of the debts mentioned in the petition and interest thereon, and be paid dividends rateably with the other creditors; and that the Commissioner should admit such proof accordingly; and such dividends were to be received and applied by the petitioner as trustee for the creditor, and to be applied for his sole benefit and advantage.

Note.—See *Ex parte Malby*, 1 Rose, 387, where the order extended to enable the petitioner to vote at the choice of assignees, as appears by the Secretary's book, vol. cxxvi. p. 138.

Ex parte WILLIAM EDWARD SHUCKHARD.—

In the matter of HENRY THOMAS ARCHER,  
one of the Solicitors of the Court of Bankruptcy.

February 15,  
March 8 and 31.

The act 8 & 9  
Vict. c. 127, s.  
3, providing for  
the discharge of  
a debtor who  
has been com-  
mitted, on pay-  
ment of the debt  
and costs re-  
maining due at  
the time of the order of imprisonment, and "all subsequent costs," means by the last expres-  
sion the costs incurred by reason of default in payment of the instalments at the times ordered  
by the Commissioner.

THIS was a motion that a solicitor of the Court might answer the matters of an affidavit filed under the following circumstances.

On December 2nd, 1845, a writ of summons was issued out of the Court of Exchequer against *Wil-*

An order of commitment under the above act ought not to be made *ex parte*.

A solicitor appearing on a summary application to answer the matters of an affidavit has the right to begin.

*Sembla*, that it must be a grave cause of complaint against an attorney of the Court, to induce the Court to interfere summarily against him for conduct not relating to a matter within the jurisdiction of the Court.



*liam Edward Shuckhard* at the suit of *Henry Richard Vizetelly*, to recover the sum of 3*l.*, being the amount of two I. O. U.s for money lent. Judgment was signed in the action on the 12th of January, 1846, and costs taxed at 5*l.* 2*s.*

1847.  
Ex parte  
SHUCKHARD.

On the 11th of February, 1846, a summons was obtained from the Court of Bankruptcy under the Small Debts Act (*a*), calling upon Mr. *Shuckard* to show cause

(*a*) 8 & 9 Vict. c. 127, s. 1, enacts, "that if any person is or shall be indebted to any other in a sum not exceeding 20*l.*, besides costs of suit, by force of any judgment obtained, or of any order for the payment thereof, or of any costs in any Court, which judgment or order shall have been obtained from any Court of competent jurisdiction in England, it shall be lawful for the creditor, so having obtained a judgment or order, to obtain a summons from any Commissioner of the Court of Bankruptcy for the district in which such debtor shall reside or be; or from any Court of requests or conscience, or inferior Court of record for the recovery of debts, or other Court for the recovery of small debts within the jurisdiction of which such debtor shall reside or be, having a judge who shall be either a barrister at law, special pleader, or an attorney who shall have practised as an attorney for not less than ten years in one of her Majesty's superior Courts of common law at Westminster, which summons such Commissioner of the Court of Bankruptcy or such Court shall be authorized and required to grant according to the form in schedule (A) hereunto annexed, upon the application of such creditor by any petition or note in writing according to the form in schedule (B) hereunto annexed; and the debtor appearing before such Commissioner or Court at the time to be appointed in such summons shall be examined by the said Commissioner or Court, and shall, if the creditor think fit, be interrogated before such Commissioner or Court by the creditor summoning him, touching the manner and time of his contracting his debt, the means or prospect of payment he then had, the property or means of payment he still hath or may have, the disposal he may have made of any property since contracting such debt; and such creditor shall also, if such Commissioner or Court shall think fit, be examined by the said Commissioner or Court touching his claim against the said debtor, and shall, if the debtor think fit, be interrogated before such Commissioner or Court touching the said claim against him; and it shall be lawful for such Commissioner or Court to make an order on the said debtor for the payment of his debt by instalments or otherwise, and in case such debtor shall not attend as required by the said summons, and shall not allege a sufficient excuse for not attending, or shall, if attending, refuse to disclose his property or his

1847.

Ex parte  
SHUCKHARD.

why he should not pay to Mr. *Vizetelly* the sum of 8*l.* 2*s.*; and on the 17th of February, 1846, an order was made by Mr. Commissioner *Evans*, ordering Mr. *Shuckhard* to pay the sum of 8*l.* 2*s.* by instalments, as follows: 1*l.* on the 17th of March, and the residue

transaction respecting the same, or respecting the contracting of the debt, or shall not make answer thereof to the satisfaction of the Commissioner or Court, or shall appear to such Commissioner or Court to have been guilty of fraud in contracting the debt, or of having wilfully contracted it without reasonable prospect of being able to pay it, or of having concealed or made away with his property in order to defeat his creditors; or if he appears to have the means of paying the same by instalments or otherwise, and shall not pay the same at such times as the Commissioner or Court shall order, or as the Court shall have ordered in which the original judgment shall have been obtained or order made, then in any of the said cases it shall be lawful for such Commissioner or the Judge of such Court to order such debtor to be committed for any time not exceeding forty days to the common gaol, wherein the debtors under judgment and in execution of the superior courts of justice may be confined within the county, city, borough or place in which such debtor shall be resident, or to any other gaol or debtors' prison within the same county, city, borough or place, which shall by any declaration of one of her Majesty's principal secretaries of state be allowed as a place of imprisonment under this act, so long as such declaration shall remain in force and unrevoked.

Sect. 2. And be it enacted, that every bailiff and messenger, to whom any such order shall be issued, or who shall be acting as an officer of the high bailiff of Westminster or Southwark in the execution of any such order issued to such high bailiff, shall be thereby empowered to take the body of the person against whom such order shall be made, and all constables and other peace officers within their several jurisdictions shall aid in the execution of every such order, and no protection or interim or other order issuing out of any Court of Bankruptcy, or for the relief of insolvent debtors, nor any certificate obtained after such order for imprisonment under this act, shall be available to any debtor imprisoned under such order as aforesaid.

Sect. 3. And be it declared and enacted, that no imprisonment under this act shall in anywise operate as satisfaction or extinguishment of any debt or demand, but any person imprisoned under this act who shall have paid or satisfied the debt or demand, or the instalments thereof payable and costs remaining due at the time of the order of imprisonment being made and all subsequent costs, shall, upon entry of such payment, indorsed on the order of imprisonment signed by the plaintiff or his attorney, be discharged out of custody by leave of a Commissioner or Judge of the Court in which the order of imprisonment was made."

by instalments, at the rate of 1*l.* on the seventeenth day of every succeeding month until the same should be fully paid.

1847.  
Ex parte  
SHUCKHARD.

On the 13th of October, 1846, two instalments being then in arrear, the respondent, who was Mr. *Vizetelly's* attorney, obtained from the Commissioner a warrant committing Mr. *Shuckhard* for forty days to Whitecross Street prison.

The warrant was directed to *Charles Milson*, of 15, Wine Office Court, Fleet Street, who was a clerk of the respondent.

On October 14th, 1846, Mr. *Shuckhard* called at the office of the respondent and then saw *Milson*, and said "I want to pay 1*l.*, and wish you to give me time for the payment of the other pound that is due." *Milson* however said that neither of the instalments could then be recieved, as he then held a warrant for Mr. *Shuckhard's* arrest for not having paid the instalments. And he then produced and showed to Mr. *Shuckhard* the warrant and detained him upon it.

After some conversation, Mr. *Shuckhard* said, "I have 10*l.* with me, and I am sure, if you like, you can settle it without my going to prison; I hope you will do so." *Milson* then said he could not take the money, and added, that even if he possessed any power to take it, there would be extra costs to pay, whereupon Mr. *Shuckhard* said, "I will pay the costs. Let me know what they are, and I will pay them, and sign any memorandum you may feel disposed to draw up for your safety," or words to that effect.

*Milson* then made out an account of what he thought the costs would amount to, and after having done so, informed Mr. *Shuckhard* that the costs would be about

1847.  
 ~~~~~  
 Ex parte  
 SHUCKHARD.

6*l.* 9*s.* 9*d.*, and the instalments then due added to that amount would be 8*l.* 19*s.* 9*d.*

Two memorandums were then drawn up and signed by Mr. *Shuckhard* as follows:—

“VIZETELLY and MYSELF.

I hereby consent to pay you the sum of 6*l.* 19*s.* 9*d.*, being the amount of extra costs incurred in obtaining a warrant against me from the Bankruptcy Court, and also costs incidental thereto and attendances, and also hereby consent to pay you the sum of 2*l.*, the arrears of instalments over due on warrant, making together the sum of 8*l.* 19*s.* 9*d.* Dated this 14th day of October, 1846.

To Mr. *Henry Thomas* *W. E. Shuckhard*  
*Archer*, attorney for the  
 above named plaintiff.”

“VIZETELLY and MYSELF.

I hereby admit that I have this 14th day of October, 1846, paid over to Mr. *Archer* the sum of 8*l.* 19*s.* 9*d.*, being for the costs of the warrant, &c. obtained against me and for the instalments due on the said warrant, and I do hereby undertake not to interfere with or take any step against you for having discharged me from custody under the warrant as aforesaid. Dated 14th October, 1846.

To Mr. *Charles Milson*, officer, *W. E. Shuckhard*.  
 who was employed in taking me in  
 execution under the said warrant.”

After these memorandums were drawn up, *Milson* said to Mr. *Shuckhard*, that he had omitted charging for the attendance upon Mr. *Shuckhard* and the trouble occasioned thereby, and suggested that an I. O. U. should be given for the balance of the instalments, which

had not then accrued due, and the sum of 6*s.* 8*d.* for the attendance.

1847.

Ex parte  
SHUCKHARD.

*Milson* then drew up the I. O. U. for the 1*l.* 8*s.* 8*d.* and read it and each of the two memorandums to Mr. *Shuckhard*, and Mr. *Shuckhard* also read them, and on being asked if he understood them said he did. They were then handed to him for him to sign, and he signed them all.

On October 20th Mr. *Archer* sent in his bill of costs, and offered to submit to have it taxed.

The above facts are taken from affidavits filed on behalf of the respondent. Many circumstances of aggravation were stated in those filed in support of the motion, but were for the most part denied.

Mr. *Tripp* appeared in support of the motion, (which was made *ex parte*), and referred to Tidd's Practice, p. 88, 9th edit., and *Re Knight (a)*, where the Court of Common Pleas granted a rule nisi, calling upon an attorney to answer for alleged misconduct though no suit was depending.

February 15.

The Court ordered that Mr. *Archer* should answer the matters of the affidavit, and that the application should stand on the paper for March 1st.

The matter coming on to be heard on this day, affidavits having in the meantime been filed on behalf of Mr. *Archer*,

March 8.  
Before the Chief  
Judge, assisted  
by Mr. Com-  
missioner Fane.

Mr. *Wigram* and Mr. *Cooke* appeared for Mr. *Archer*.

(a) 1 Bing. 91, but see also *Smith v. Town*, 2 Dowl. P. C. 673; *Peace v. Roberts*, M'Clel. & Y. 105.

1847.

Ex parte  
SHUCKHARD.

Mr. *Bacon* and Mr. *Tripp* for Mr. *Shuckhard* claimed the right to begin.

March 8.

The CHIEF JUDGE held, that in accordance with the practice in courts of law on such applications, the counsel for the solicitor were entitled to begin.

Mr. *Wigram* and Mr. *Cooke*. Mr. *Archer* offered to consent to have the bill taxed and to abide by the result, but this offer was rejected. The present application is altogether without precedent in this Court, which has declined to exercise jurisdiction upon matters coming before the Commissioners otherwise than in bankruptcy (*a*); and has also refused to interfere in the matter of a solicitor with respect to matters not relating to the administration of a bankrupt's estate (*b*). And even in a court of law, such an application as this must fail, *Ex parte Brooks* (*c*); *Crozer v. Pilling* (*d*).

The first order is only for payment of costs of obtaining the judgment, but if the first order is not complied with, then, by the third section of the act, before the debtor is entitled to his discharge, he must pay the instalments and costs remaining due at the time of the order of imprisonment being made and all subsequent costs. The demand made therefore by Mr. *Archer's* clerk was no more than the act entitled him to make.

The CHIEF JUDGE.—If there had been an actual imprisonment, the Commissioner would have settled the

(*a*) See *Ex parte Newland*, ante p. 150. (*c*) 1 Bing. 105.

(*b*) See *Ex parte Bull*, 3 D. & C. 116. (*d*) 4 B. & C. 26.

terms on which the debtor was to be discharged, but the other party has no right to settle them for himself.

1847.

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Ex parte  
SHUCKHARD.

Mr. *Swanston* and Mr. *Tripp* for Mr. *Shuckhard* contended that the order of the Commissioner was irregular, being made in the absence of the debtor; and with reference to the jurisdiction of the Court and the mode of proceeding, they cited *Wadworth v. Allen* (a); *Ex parte Knight* (b); and *Evans v. Duncomb* (c).

The CHIEF JUDGE in the course of the argument said it appeared to him, though he would not decide, that the order to be made upon default ought not be made *ex parte*. His HONOR thought the Commissioner ought to be satisfied at the time of signing the commitment that the debtor was able to pay, and moreover, ought to fix the period of imprisonment, (which the act leaves to his discretion within a certain limit,) according to the circumstances of the case, neither of which points could be properly disposed of on an *ex parte* application. The amount to be paid included "all subsequent costs," but the statute made no provision for the taxation of these costs. His HONOR said he felt some difficulty in interfering in a summary way under the jurisdiction in bankruptcy, and inquired if both parties would agree to treat the application as one for the taxation of Mr. *Archer's* bill.

This was agreed to.

The CHIEF JUDGE.—Let the bill then be taxed. Mr. *Fane* agrees with me in thinking that the words, "all

(a) 1 Chitty, 186. (b) 1 Bing. 91. (c) 1 Crom. & Jer. 372.

1847.  
~  
Ex parte  
SHUCKHARD.

subsequent costs," mean costs incurred by reason of default in payment of the instalments at the time ordered by the Commissioner. Mr. *Archer* consenting to treat this application as one to tax the bill delivered on the 14th of October, and consenting that the bill shall be taxed, let a bill be delivered for the 7*l.* 6*s.* 5*d.*, and let that bill be taxed by Mr. *Vizard*. Let the petition stand over in other respects, reserving all costs, and let it be stated to the taxing officer what is my opinion of the construction of the statute.

March 31.

The matter now came on again, the bill of costs having been taxed at 1*l.* 15*s.* 8*d.*

Mr. *Swanston* and Mr. *Tripp* for Mr. *Shuckhard* asked for the costs of the proceedings.

Mr. *Wigram* *contra*.

The CHIEF JUDGE.—My difficulty was this, that Mr. *Archer* had not acted in this matter with reference to any thing which is the subject of the jurisdiction of the Court of Review, and although this circumstance may not be conclusive as to the jurisdiction of the Court, I doubted whether the matter was sufficiently grave to call upon the Court to interpose in a summary way where the transactions in question were not the subjects of its jurisdiction. It was upon these grounds that I suggested a submission to the jurisdiction on the part of Mr. *Archer*, and, without saying what I should have done as to costs, if Mr. *Archer* had not made the offer to submit his bill to taxation, I think the right order under all the circumstances will be to direct repayment of the sum taxed



off; and that Mr. *Archer* shall pay Mr. *Shuckhard's* costs of taxation and of this application, except so far as such costs have been incurred by affidavits filed on either side before the date of the order for taxation. As to such affidavits, no costs on either side.

1847.  
  
 Ex parte  
 SHUCKHARD.

It was mentioned to the Court by the counsel, that since the former hearing, the Commissioners had resolved for the future not to make any orders for commitment *ex parte*.



Ex parte JOHN LOUCH, HENRY LOUCH and JOHN THOMPSON.—In the matter of HEWSON DUTCHMAN.

ON the 15th of September, 1846, the bankrupt filed a declaration of insolvency.

On the 17th September, 1846, the fiat issued against him, upon his own petition, as a trader unable to meet his engagements, and creditors' assignees had been chosen.

The petitioners were creditors of the bankrupt to the amount of 100*l.* and upwards, and had, as well as several other creditors, proved their debts under the fiat.

Upon the investigation of the affairs of the bankrupt, it appeared, that before the time when the declaration of insolvency was filed, but subsequently to the time when the debt due to the petitioners and several others were contracted, certain dealings and transactions took place between the bankrupt and some of his creditors other than those who had proved their debts under the fiat;

March 3 and  
 May 28.

Bankrupt's own fiat annulled with his consent and consent of assignees, to enable a creditor's fiat to be sued out, under which transactions between the bankrupt and others might be impeached.

Form of order as to costs.

1847.

Ex parte  
Louch  
and others.

by means whereof the whole of the bankrupt's property, except his household furniture and effects, and some inconsiderable property, was appropriated by the bankrupt to the payment of the debts claimed to be due from him to such other creditors, in exclusion of the claims of the petitioners and the general creditors.

The petitioners deposed, that they and other creditors of the bankrupt who had proved their debts were desirous that such dealings and transactions should be investigated and the validity thereof impeached, but were advised that the validity of these dealings could not be effectually questioned under the present fiat, by reason that the fiat having issued upon the petition of the bankrupt, and not upon the petition of any creditor, there was not any debt to which the fiat could have relation. The prayer of the petition was, that the fiat might be annulled, and that the costs of the proceedings under the fiat and of the application might be paid out of the bankrupt's estate, and that the petitioners might be at liberty forthwith to sue out another fiat, directed to the same Commissioner as the former fiat was directed; and also that the same official assignee might be appointed.

Mr. *Bacon* supported the petition.

Mr. *Freeling* for the bankrupt and the assignees consented.

The Order was to annul the fiat, and that the petitioners should be at liberty to issue a new fiat; and that if the petitioners should duly prosecute so that creditors' assignees should be chosen under such new fiat, the petitioners' costs of and

occasioned by the present application should be paid out of the estate of the bankrupt got in under such new fiat, such costs to be taxed by the Commissioner acting in prosecution of such new fiat.

1847.

Ex parte  
Louch  
and others.

Mr. *Freeling* on this day moved, on behalf of all parties, for a supplemental order providing for the costs of the assignees. May 28.

The COURT ordered, by way of supplement to the former order, that if the petitioners should have prosecuted the former order, and should have issued a new fiat and duly prosecuted the same, so that assignees were chosen by the creditors, the costs of the assignees of and occasioned by the former application and of this application, and of the proceedings under the annulled fiat, should be paid out of the estate under the new fiat.



1847.



March 17, 1847,  
and May 3,  
1848.

A trader being indebted to his bankers gave them a receipt for 1000*l.*, purporting to be in full for the purchase of the furniture, plate, wines and effects in his house; but no possession was given of the goods till a year afterwards, when the trader's solicitor applied to the bankers on his behalf for a loan of 10,000*l.*, stating that a creditor of the trader would obtain judgment, on which he could issue execution, but that if this creditor refused to give the trader time the bankrupt would protect himself and his other creditors. The day after this communication and in consequence of it, the bankers sent a man to take possession, which was delivered to him by the trader, who on the same day filed a declaration of insolvency and sued out a fiat against himself: *Held*, that the delivery of possession was not a fraudulent preference.

*Quere*, as to the effect of a joint possession of the servants of the bankrupt and of the owner of goods as to reputed ownership.

*Semble*, that an examination of a party before the Commissioner may be read to discredit an affidavit of the same witness made upon a petition.

Ex parte EDWARD MARJORIBANKS the Elder, Sir EDMUND ANTROBUS, Baronet, WILLIAM MATTHEW COULTHURST and EDWARD MARJORIBANKS the Younger, trading under the Style or Firm of COUTTS and Company.—In the matter of ALEXANDER RAINY.

THE bankrupt carried on business in Regent Street, London, as an auctioneer, and the petitioners were his bankers.

In April, 1845, he was indebted to them in a considerable amount, for which they held a mortgage of his leasehold premises in Regent Street, a deposit of some policies of assurance and other securities.

On the 15th of April, 1845, the petitioners advanced him the further sum of 1000*l.* on his promissory note.

In the month of January, 1846, the petitioners were about to press the bankrupt for payment of the whole or some part of the balance which then remained due from him, he having then neglected to perform his promise to make some payments on account; and on the 30th day of January, 1846, the bankrupt, in order to induce the petitioners to allow him further time and indulgence, wrote and signed the following receipt:

“ London, January 30, 1846.

Received of Messrs. *Coutts & Co.* the sum of 1000*l.* for the fixtures, household furniture, pictures, books, Etruscan vases, plate, and miscellaneous effects, at

Received of Messrs. *Coutts & Co.* the sum of 1000*l.* for the fixtures, household furniture, pictures, books, Etruscan vases, plate, and miscellaneous effects, at

No. 14, Regent Street, which are sold to them by me, and are their absolute property.

£1000.

*Alexander Rainy."*

1847.

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Ex parte  
MARJORIBANKS  
and others.

He delivered the receipt to the petitioners, with the following memorandum in writing, dated the 30th of January, 1846.

" London, January 30, 1846.

I have deposited with Messrs. *Coutts & Co.* the conveyances of a plot of land in Berks and of a land tax in Bucks, as further collateral security for the advances of money made by them to me."

He at the same time deposited with the petitioners the deeds of conveyance of the plot of land and land tax, whereby the same were respectively conveyed to him.

On the 22nd December, 1846, the petitioners received from the bankrupt a letter, stating that the bankrupt had fully expected that two sums of 208*l.* and 1000*l.* would have been placed to his credit with the petitioners; and that in the expectation of the receipt of these sums the bankrupt had promised the payment of his half-year's rent, some taxes and some private matters, amounting together to about 600*l.* And the letter continued thus: "I am therefore under the necessity of troubling you with explanation, and with the hope that you will be so obliging as to permit me to draw for the 600*l.* I require (or may require) between this and the period alluded to in Mr. *Broderip's* note, and on which I have written an authority for your receiving the 1000*l.*, and the other 200*l.* (for which I have added another order) will be payable through your house. Another sale of the Blessington estates is to come on in April."

The sum of 600*l.* was on the 26th of December, 1846, placed by the petitioners to the credit of the bank-

1847.

Ex parte  
MARJORIBANKES  
and others.

rupt's banking account in the ordinary course of business; and the bankrupt made and delivered to them his promissory note, dated the 26th of December, 1846, and the following memorandum :

“ London, 26th December, 1846.

“ Messrs. *Coutts & Co.*

You are under advance to me 6000*l.* on which some interest is due, for securing which you hold my promissory notes, an assignment of two policies on my life for together 3000*l.*, and the lease of my premises in Regent Street. You have this day advanced me the further sum of 600*l.*, and I have deposited in your hands the conveyance to me from the Commissioners of Woods and Forests of a piece or parcel of land, part of the New Lodge Estate in Windsor Forest, dated 12th December, 1834, and a receipt for 1000*l.*, being the value of my furniture and effects in Regent Street, paid or advanced by you to me: Now I declare, that the said policies of insurance and assignments thereof, the lease of the premises in Regent Street, the conveyance from the Commissioners of Woods and Forests, and the receipt, are deposited in your hands for securing as well the 6000*l.* and interest so now due as aforesaid as the 600*l.* this day advanced, and interest thereon. A treaty is on foot by which I expect to dispose of the premises in Regent Street; and if this is done I shall pay off your several advances, but if not concluded within six weeks from this date, I engage to perfect on demand and at my expense the foregoing securities to you by way of lease or assignment, or otherwise, in such other manner as you shall desire. I place in your hands two orders for the receipt of money, one to Mr. *Francis Broderip* for 1000*l.*, the other to Mr. *W. T. Longbourne* for 208*l.*;

and upon the receipt of these sums you will repay yourselves your advance of to-day of 600*l.* and 500*l.* in part discharge of the 6000*l.*”

In the afternoon of the 13th of January, 1847, Mr. *Frampton*, the solicitor of the bankrupt, called at the banking-house of the petitioners, and had an interview with the petitioner Mr. *Coulthurst*. At this interview Mr. *Frampton* proposed that the petitioners should make the bankrupt a further advance of 10,000*l.*; and as an inducement to the petitioners to make such advance, Mr. *Frampton* produced what purported to be a statement of the bankrupt's debts and assests, whereby it was made to appear that the debts of the bankrupt amounted (including what was due to the petitioners) to 15,500*l.* or thereabouts, and the assets to 18,500*l.*, or, as mentioned in the statement, at the worst to 15,000*l.* Mr. *Coulthurst* then remarked to Mr. *Frampton*, “According to your showing, here is a surplus in favor of Mr. *Rainy*. Has he no friend who will lend the money?” To which Mr. *Frampton* replied “Not so large a sum.”

In the course of this interview, Mr. *Frampton* stated that Sir *Charles Ogle* would obtain a judgment against the bankrupt, upon which he could then issue execution on the 16th of January then instant, but that application had been made to Sir *Charles Ogle* to give time to the bankrupt for payment; and which application he, Mr. *Frampton*, believed would be successful, but that if it were not so, rather than Sir *Charles Ogle* should sweep the decks and gain an advantage over other creditors, the bankrupt would protect himself and them; but in what way the bankrupt would protect himself and his other creditors was not stated by Mr. *Frampton*.

Mr. *Coulthurst*, in answer to his statement, simply in-

1847.

Ex parte  
MARJORIBANKS  
and others.

1847.  
Ex parte  
MARJORIBANKS  
and others.

formed Mr. *Frampton* that his firm could not make any further advance to the bankrupt. In the course of conversation with Mr. *Frampton* on the 13th of January, Mr. *Frampton*, when speaking of the execution which Sir *Charles Ogle* might issue, said, that the petitioners ought to have had a bill of sale of the furniture and effects, and to have taken possession thereunder. Mr. *Coulthurst* said in reply to this observation, that the petitioners could then take possession of the furniture and effects. Upon which Mr. *Frampton* remarked that he doubted if the receipt of the 30th of January, 1846, would enable the petitioners to take possession; but that if it would, he thought that the petitioners ought not to avail themselves of what he had said at an interview had for the purpose of procuring a further advance. Mr. *Coulthurst* deposed by his affidavit that at this interview with Mr. *Frampton* bankruptcy was never mentioned by him, but that after the interview with Mr. *Frampton*, Mr. *Coulthurst* considered it advisable, as an execution might issue against the bankrupt on the part of Sir *Charles Ogle*, and as many of the securities had been prepared by the petitioners without consulting their solicitors, that they should then be consulted and be directed to take any steps which they might judge necessary to protect the petitioners' interests; but that he did not then contemplate, nor to his belief did any or either of his partners contemplate, taking actual possession of the furniture and other effects or giving notice to the insurance office in which the policies were effected. He accordingly directed a clerk named *George Robinson* to see Messrs. *Farrar* and *Parkinson*, their solicitors. Mr. *Robinson* accordingly, on the morning of the 14th January, 1847, went to Messrs. *Farrar* and *Parkin-*



*son's*, and accompanied Mr. *Jarrett*, a clerk of theirs, to the chambers of a conveyancer, to whom were submitted the different deeds and securities of the bankrupt held by the petitioners; and the conveyancer then advised that actual possession ought to be taken of the furniture and effects and notice given to the insurance company of the assignment of the policies; but until this advice was given there was no intention on the part of the petitioners to take possession of the furniture and effects. And Mr. *Coulthurst* further deposed, that he had not, and to the best of his knowledge and belief neither of his partners or any other person or persons in their service or in any way connected with them had, any notice whatever of any act of bankruptcy committed by the bankrupt, or of any intention on the part of the bankrupt to commit an act of bankruptcy, until after actual possession taken of the furniture and effects and notice given to the insurance office of the assignment of the policies.

On the 14th of January Mr. *Jarrett* handed to Mr. *Bullock*, the auctioneer, an authority dated the 14th of January, signed by Messrs. *Farrar & Co.* as the solicitors for Messrs. *Coutts & Co.*, and directed to Messrs. *Bullock* to take possession; and Mr. *Bullock* forthwith proceeded to the bankrupt's premises, No. 14, Regent Street, to take and hold possession of the fixtures, furniture and other effects therein, according to the tenor of the authority.

Mr. *Jarrett* accompanied Mr. *Bullock* and Mr. *Greenfield* (a person in the employ of Mr. *Bullock*) to the premises, and arrived there about 3 o'clock on the 14th of January. On reaching the premises, Mr. *Jarrett* asked to see and did see the bankrupt, in order to explain to him the step which the petitioners were about to take;

1847.

Ex parte  
MARJORIBANKS  
and others.

1847.

Ex parte  
MARJORIBANKS  
and others.

and Mr. *Jarrett* then informed the bankrupt that the petitioners were advised to take possession of the furniture and other effects on the premises, and that Mr. *Bullock* was then there for that purpose. The bankrupt was at first surprised at the communication, and said that he did not think that the petitioners would have resorted to such a measure against him, but he added that they had a right to take every precaution for their own security, and that he could not complain of their conduct after the invariable kindness and consideration which had been shown him by them in all the money transactions which had taken place between them, or words to such or the like effect.

Mr. *Jarrett*, believing that it was necessary that the bankrupt should deliver formal possession of the furniture and effects, requested him to do so to Mr. *Bullock*, and which he consented to do; but Mr. *Jarrett* had not received any directions from Messrs. *Farrer & Co.* or from any other person to take that step. At Mr. *Jarrett's* request the bankrupt called Mr. *Bullock* into the room where Mr. *Jarrett* and the bankrupt then were, and then delivered to Mr. *Bullock* a chair, and told him that he, the bankrupt, delivered up to him on behalf of the petitioners possession of all his furniture and effects in and about the premises. Mr. *Bullock* inquired of the bankrupt if there was an inventory, and in answer thereto the bankrupt said that he thought he should be able to find one. Mr. *Bullock* then put *Greenfield* in possession of the furniture and effects, and left the premises.

Amongst the furniture and effects of which *Greenfield* was so placed in possession were two chests containing plate and plated articles belonging to the bankrupt. *Greenfield* took possession of them as well as of the fur-

niture and effects; and about 10 o'clock in the morning of the 15th of January he, with the assistance of a servant of the bankrupt named *Pratt*, delivered the two chests into the possession of Messrs. *Farrer & Co.*, with this exception, *Pratt*, however, had not possession of the chests or either of them on the 14th or 15th of January. One of the chests was unlocked, and remained so during the time the same was in *Greenfield's* possession; and the other had a key in the lock, which could not be got out, and the key remained therein also during the time that the chest was in *Greenfield's* possession.

About one o'clock on the 14th of January Mr. *Frampton* sent to Sir *Charles Ogle's* solicitor to know if Sir *Charles* had authorized the latter to give the bankrupt the time which he had asked, and received for answer that no time could be given. Mr. *Frampton* thereupon communicated this to the bankrupt, who then determined to make himself bankrupt; and between two and three o'clock on the 14th of January Mr. *Frampton*, by the bankrupt's direction, filed a declaration of insolvency, and bespoke a fiat on the bankrupt's petition, and the fiat issued on January 15th.

The petitioners sought an account of what was due to them on their securities and for the ordinary equitable mortgagees' order.

In the course of the reading of the evidence,

Mr. *Bacon* and Mr. *Bush*, who appeared for the assignees, proposed to read the examination before the Commissioner of one of the witnesses who had made affidavits in support of the petition, for the purpose of showing a discrepancy between the statements made by him on the two occasions.

1847.

Ex parte  
MARJORIBANKS  
and others.

1847.  
  
*Ex parte*  
 MARJORIBANKS  
 and others.

Mr. *Swanston*, Mr. *Russell* and Mr. *Glasse* for the petitioners objected to the examination being read, and cited *Ex parte Chambers* (a).

The *Chief Judge*.—I should follow as I have already followed (b) the authority of *Ex parte Chambers*; but that authority does not appear to me to affect a case where it is proposed to read an examination elsewhere of a witness who has made an affidavit, for the purpose of discrediting the witness. I am, however, ready to hear it argued that this is within the principle of the decision in *Ex parte Chambers*.

It was ultimately arranged that the case should proceed, and that the objection should be reserved, if the decision were found to depend in any degree upon the admission of the examination in evidence.

Mr. *Swanston*, Mr. *Russell* and Mr. *Glasse* in support of the petition. Although the possession of the goods was taken on the same day as the declaration of insolvency, yet the evidence proves that it was done without any communication or suggestion to that effect from the bankrupt, and solely in consequence of the alarm arising from the application for a further advance of so great an amount as 10,000*l*. [The *Chief Judge*.—Was the application one which a reasonable man could suppose to be sincere?] Under the circumstances we submit it was clearly so. But it is sufficient if possession was taken before the issuing of the fiat and without notice of an act of bankruptcy, which notice is positively denied here, and that denial is not in any manner con-

(a) 2 M. & A. 466.

(b) *Ex parte Ress*, ante, p. 208.

troverted. In *Ex parte Smith* (a) policies of assurance had been deposited, but no notice was given to the office until immediately before the issuing of the fiat. Lord *Lyndhurst*, however, held that, as no notice was proved to have existed of an act of bankruptcy having been committed, the notice to the insurance office was a dealing or transaction by or with the bankrupt within the meaning of the 2 & 3 *Vict. c. 29*.

In *Conway v. Nall* (b), an execution creditor, who was about to seize, received a general notice that the debtor had committed an act of bankruptcy, and that he had signed a declaration of insolvency; and it was insisted that this notice invalidated the seizure under the execution. The Court of Common Pleas, however, held otherwise, Chief Justice *Tindal* saying that the notice did not show that there was an act of bankruptcy complete at the time, because two steps were necessary to make the declaration of insolvency an act of bankruptcy, viz. the declaration must be filed with the Secretary of Bankrupts, and a memorandum must be signed by him for insertion in the Gazette. And his Lordship added, "Putting it at the highest, it was merely calculated to lead the parties to whom the notice was sent to infer that an act of bankruptcy would be committed provided all proceeded regularly. The bankrupt law does not invalidate the execution, because the creditor has reason to fear that an act of bankruptcy is about to be committed; it does so only where there is a notice that an act of bankruptcy has actually been committed." [The *Chief Judge*.—There seems some analogy between that case and the present, but the fiat there was not sued out by the bank-

1847.

*Ex parte*  
MARJORIBANKS  
and others.

(a) 2 M. D. & De G. 219.

(b) 1 C. B. Reports, 643.

1847.

Ex parte  
MARJORIBANKS  
and others.

rupt himself.] That distinction is in our favor; for the principle of relation to the act of bankruptcy, which rendered it necessary to pass the recent enactments gradually extending the protection of persons dealing bonâ fide with persons who become afterwards bankrupt, has no application to fiats sued out by the bankrupt himself. In *Pariente v. Pennell* (a) it was held sufficient if possession were taken by the true owner before the fiat.

Mr. *Bacon* and Mr. *Bush* for the assignees. The petitioners according to the terms of the memorandum of December 20th were not entitled to have their security perfected by possession until six weeks had elapsed from the date of the memorandum and demand made. Now the six weeks did not expire till after the fiat issued. The delivery of the possession, therefore, must have been, as it appears to have been in all its circumstances, delivered spontaneously by the bankrupt, and cannot be considered otherwise than as a fraudulent preference. [The *Chief Judge*.—Would it not be new to hold that an act was a fraudulent preference when done in pursuance of a prior contract which was not itself a fraudulent preference? Did not Lord *Mansfield* intimate an opinion to the contrary of such a proposition in Mr. *Fordyce's case* (b)?] It has been decided by many authorities that the taking or delivery of possession of goods even by the owner upon the eve of bankruptcy cannot be supported. And the goods in this case were in the reputed ownership of the bankrupt at the time he

(a) 2 Moo. & Rob. 517.

(b) *Harman v. Fisher*, 1 Cowp. 123; and see *Vacher v. Cocks*, 1 B. & Ad. 145; *Hunt v. Mortimer*, 10 B. & C. 44.

became bankrupt (a) by filing the declaration of insolvency. They cited *Lingard v. Messiter* (b).

1847.

Ex parte  
MARJORIBANKS  
and others.

The CHIEF JUDGE.—Upon the materials before me, I have no doubt that the notice given to the insurance offices of the assignment of the policies was valid, and that, as to the policies, the petitioners' security is good. I should have been of the same opinion as to the furniture, plate, &c. if the bankrupt had left the house, and relinquished the physical dominion of the whole to *Greenfield*. At present my only doubt is as to the nature and character of the possession of the goods, which appears to have been a kind of mixed possession of the servants of the bankrupt and the servant of the petitioners. How was any one to know that the person employed by the petitioners was in possession? His HONOR referred to *Darby v. Smith* (c) and *Mace v. Cadell* (d).

Mr. Swanston in reply on this point.

The CHIEF JUDGE thought the petitioners entitled to try the question in an action, the terms of which were then settled.

On this day a petition came on to be heard for the compromise of the matters in dispute, and an order was made for carrying the compromise into effect, each party paying their own costs, and the assignees' costs to come out of the estate.

1848.  
May 8.

(a) This means the time of the commission of the act of bankruptcy, not of issuing of the fiat. See *Fawcett v. Fearn*, 6 Q. B. 20.

(b) 1 B. & C. 308, 319.

(c) 8 T. R. 82.

(d) 1 Cowp. 232. See also *Ex parte Castle*, 3 M. D. & De G. 117.

1847.

April 21.

May 26.

A creditor, whose proof has been neither admitted nor rejected but only adjourned, cannot be heard on his petition to set aside the choice of assignees.

At the sitting for the choice of assignees under the bankrupt's own fiat, all the creditors but two appeared by the bankrupt's solicitor, and the proof of the two was adjourned for further evidence; the other creditors then chose assignees, and afterwards the proof of the two was admitted on further evidence: *Held*, sufficient grounds for a new choice.

Ex parte THOMAS MORSE and JAMES MORSE,  
surviving Executors of JOHN MORSE, deceased.  
—In the matter of ROBERT LAYT.

**THIS** was a petition of creditors to set aside the choice of assignees, and for the admission of a proof.

The petitioners were the surviving executors of one *John Morse*, who was a brewer at Swaffham, and died in August, 1830. He was the landlord of the bankrupt, and supplied him with beer.

The petitioners continued the business as executors, and claimed to be creditors at the date of the fiat for 31*l.* 17*s.* 6*d.*

The fiat issued on February 3, 1847, on the bankrupt's own petition, and on February 8 an official assignee was appointed. A public meeting for the proof of debts and choice of creditors' assignees under the fiat was held at the Court of Bankruptcy on the 26th of February, at which an agent of the petitioners attended to prove on their behalf.

A deposition of debt was sworn and tendered to the Commissioner, with an account annexed, setting forth the goods supplied by the petitioners and the payments made by the bankrupt on account thereof, (thereby showing the balance of 31*l.* 17*s.* 6*d.*), and also a verified extract from the petitioners' books, the removal of which would have interfered with carrying on their business at Swaffham. The petitioners' agent also produced a great number of the orders given by the bankrupt to the petitioners.

The bankrupt's solicitor objected to the proof, alleging (as the fact was) that the petitioners had not previously to



the bankruptcy rendered their account to the bankrupt subsequently to the month of August, 1844.

The Commissioner adjourned the proof for further investigation, whereupon the petitioners' agent applied to the Commissioner to admit the proof, for the purpose of enabling the petitioners to vote in the choice only, or to adjourn the choice until the petitioners' account could be fully investigated.

This application was refused by the Commissioner, and two of the creditors present were chosen and appointed creditors' assignees, and accepted such appointment, which was approved of and confirmed by the Commissioner.

The petitioners stated by their affidavit that their debt was considerably larger in amount than the aggregate amount of the debts proved by other creditors of the bankrupt who voted, and that if the petitioners had been permitted to vote, they would have carried and controlled such choice, and would not have concurred in choosing the present assignees. It also appeared that the creditors who voted appeared by the same solicitor as the bankrupt.

Mr. *Russell* appeared in support of the petition.

1847.  
Ex parte  
Moran  
and another.  
April 21.

Mr. *Swanston*, for the assignees, objected that the petitioners could not be heard until they had proved, and that as their proof had not been rejected, the part of the prayer which sought its admission was premature.

Mr. *Russell* *contra*.

The CHIEF JUDGE.—I am of opinion that if I am to

1847.  
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Ex parte  
Morse  
and another.

disturb this choice, as to which I give no opinion at present, I can only do so at the instance of a creditor who has proved under the fiat, and I cannot at present decide on the question of proof. The petition must stand over till the Commissioner has admitted or rejected the proof.

The Commissioner afterwards admitted the proof, giving the following judgment.

In this case Messrs. *Morse & Co.* applied at the first sitting on the 26th of February last to prove their debt, which they alleged to be a balance of 31*l.* 17*s.* 6*d.*, and of which they produced an account, commencing with a balance as agreed in August, 1844. *Morse & Co.* were brewers, and *Layt* kept a public-house as tenant to them. It was objected that the proof ought to stand over for investigation for two reasons, first, that Messrs. *Morse & Co.* had not rendered any account to the bankrupt of goods sold and delivered since 1844; and secondly, that Messrs. *Morse & Co.* had seized, only fourteen days before the bankruptcy, for ten years' arrears of rent, and had not at that time rendered any account of the proceeds of their seizure. Both these facts were admitted; but it was answered for Messrs. *Morse & Co.* that the debt in respect of which they sought to prove was a debt for goods sold and delivered, and had nothing to do with the debt for rent, and that if anything wrong had been done under the seizure for rent, this Court had no jurisdiction to redress it, but that redress must be sought in due course of law elsewhere. In this latter argument I acquiesced; but I thought that, having regard to the admitted irregularity of Messrs. *Morse & Co.* in not having rendered any account to the bankrupt since

August, 1844, considering their double relation to him of landlord of a public-house and suppliers to that house of beer, and the oppression which that double relation enabled them to exercise, and having regard also to their having seized for ten years' arrears, as to which, if there had been any impropriety, they would, if chosen assignees, have to contest, on behalf of the creditors, the propriety of their own conduct; I ought, if possible, to take such steps as would prevent their influencing the choice of assignees, and I directed that the admission of the proof should stand over, without prejudice, until their account from August, 1844, till then unexamined, should have been examined in the official assignee's office. Messrs. *Morse* petitioned the Court of Review, and the Court ordered the matter to stand over till this Court had adjudicated on the proof. The question of proof now comes before me again, and it now appears that Messrs. *Morse's* account was correct, so far as concerns the items since August, 1844; but that the balance of August was incorrect in this respect, that the rent account and the goods account had been originally blended, and that the effect of that blending was, that all rent was discharged by credits in the general account up to October, 1841, and that by such arrangement both parties are bound, or that, on that day, the rent being discharged, *Layt* was debtor for a large sum for goods sold and delivered. It afterwards occurred to Messrs. *Morse* that a debt for rent was more recoverable than a debt for goods, so they shifted the account, and by redebiting the rent in a new and distinct account, and withdrawing the debit from the old account, they diminished the balance on the goods account, increasing it on the rent account. This however they had no right

1847.

Ex parte  
*Morse*  
and another.

1847.

Ex parte  
MORSE  
and another.

to do, as I conceive, even with the consent of *Layt*, because by so doing they prejudiced the rights of third parties. The practical result is, that the sum which they now seek to prove is less than what they ought to prove, but their right to prove the larger sum being a right which they may waive, I shall now admit them to prove for the smaller sum of 316*l.* 17*s.* 6*d.*, leaving the assignees to contest with them in the proper Court their rights under the original seizure for ten years' arrears of rent. But I must add, that I consider that my direction, at the first sitting, that their proof should stand over for investigation was entirely in accordance with the practice of this Court.

May 26.

The petition was again placed in the paper to be disposed of.

Mr. *Russell* in support of the petition. It is clear from the reasons assigned by the Commissioner, that the proof ought to have been admitted, and that the petitioners have been excluded from voting without sufficient reason, which is a sufficient ground for a new choice. But another ground which vitiated the proceeding, is the interference of the bankrupt's solicitor, who, in fact, alone directed and controlled the choice. This circumstance would, of itself, have been sufficient ground, under the old law, for setting aside the appointment. [The *Chief Judge*.—I am disposed to think that the absence of any party sustaining the character of petitioning creditor at the choice is not without materiality.] There was no person present to protect the interests of the creditors at the choice. As the official assignee now represents the estate, there is no reason for proceeding

at once to the choice of assignees when there is a fair ground for postponement.

1847.

Ex parte  
Morse  
and another.

The CHIEF JUDGE.—There is no petitioning creditor, and the only legal agent concerned in the choice was the solicitor of the bankrupt by whom the fiat was sued out. The fitness of the assignees is not impeached. The point is a short one. What do the assignees say?

Mr. *Swanston*. The Commissioner adjourned the proof tendered to him, because it required investigation. Then, the proof being properly adjourned, the Commissioner was bound to proceed at once to the choice of assignees. In *Ex parte Butterfill* (a), Lord *Eldon* said, “as to the second point, it frequently happens that the accounts of creditors are in that unravelled state that they are not prepared to establish their proofs, but the proceedings under a commission are not stopped on that ground. It is a general rule, that the appointment of assignees will not be disturbed when chosen by those who can make immediate proof, although those who may not have been prepared so to do would have turned the scale. It is not an universal rule, though almost an universal rule, the removal of assignees being matter of subsequent discretion in the great seal. But the choice of assignees must proceed, because however few the creditors may be, and taking for this purpose *Rashleigh’s* debt to be *bonâ fide*, the proceedings under the commission must not be impeded.”

The CHIEF JUDGE.—That was said before there were official assignees.

(a) 1 Rose, 195.

1847.

Ex parte  
Morse  
and another.

Mr. *Swanston*.—But the proceedings are as much impeded now as they were then by the adjournment of the choice. There was no more inability under the old system than under the present to protect the property, for there was then a provisional assignee. There were two creditors present, and these represented the general body, at least as well as a petitioning creditor could have done.

The CHIEF JUDGE.—I proceed on the ground that the fiat here was sued out by the bankrupt himself and not by a petitioning creditor,—on this further ground that all the creditors who voted at the choice were represented by the bankrupt's solicitor, who in that character had sued out the fiat—on the farther ground that from the moment of the adjudication all the estate is now vested in the official assignee;—and lastly on the ground that the petitioners have now been admitted to prove for every shilling which they claimed to prove at the meeting for the choice of assignees. I think that on all these grounds together the choice must be set aside, and that there must be a meeting for a new choice. If improper persons shall be chosen, the Commissioner will exercise his discretion in rejecting them. The costs of all parties must come out of the estate. I proceed on the very special circumstances of the case.

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1847.

Ex parte WILLIAM MARTIN.—In the matter of  
WILLIAM MARTIN.

**THIS** case came on upon a return to a writ of *habeas corpus* sued out by the bankrupt, who, during an examination before the Commissioner as to the disposal of part of his property, stated that he had sold his business, (lease, fixtures, and stock, &c.) for 140*l.*, and gave this money in gold to his brother to keep, and that one night he took it from his brother, and put it in his great-coat pocket behind; that he then took a seat in the third class Eastern Counties Railway to Edmonton, and when he got to his lodgings at night he missed the money. On examination, however, he admitted that he had that night supped with his landlord and landlady, and had not said a word about his loss, nor had in fact ever mentioned it until his examination.

The Commissioner considered this statement unsatisfactory, and, as the bankrupt would give no other, committed him to the custody of the messenger, to be brought up before a Subdivision Court (a).

(a) The following are the enactments which were referred to in the argument:

9 *Geo.* 4, c. 16, s. 36, "It shall be lawful for the Commissioners, by writing under their hands, to summon any bankrupt before them, whether such bankrupt shall have obtained his certificate or not; and in case he shall not come at

the time appointed, the Commissioner may make such order thereupon. The bankrupt was then taken back to custody. *Held*, that his further detention was illegal, without a second warrant.

*Seem*, that it is not necessary under such circumstances that the bankrupt's further statement should be satisfactory to the Commissioners forming the Subdivision Court, but that the bankrupt, answering to the satisfaction of the Commissioner acting in the prosecution of the fiat, is entitled to his discharge.

*Quere*, whether under the present law a commitment until the bankrupt shall answer to the satisfaction of the Commissioners forming the Subdivision Court, or any of the Commissioners of the Court, is good.

Affidavits may be read both on behalf of the prisoner and of those opposing his discharge, on a return to an *habeas corpus*.

[ May 26.  
A bankrupt was committed by a Subdivision Court until he should submit to the Subdivision Court or any of the Commissioners, and full answer make to their satisfaction. The bankrupt afterwards appeared before the Commissioner, who was acting in the prosecution of the fiat, for the purpose of passing his last examination, when, it appearing that he had not filed his balance sheet within the requisite time, the Commissioner adjourned the last examination. The bankrupt, upon that occasion, reiterated an unsatisfactory statement, for which he had been committed, with an addition, which the Commissioner

1847.

Ex parte  
MARTIN.

On his being brought up accordingly on March 25, 1847, his answers again proved unsatisfactory, and he was

the time by them appointed (having no lawful impediment made known to them at such time, and allowed by them), it shall be lawful for the said Commissioners, by warrant under their hands and seals, to authorize and direct any person or persons they shall think fit to apprehend and arrest such bankrupt, and bring him before them; and upon the appearance of such bankrupt, or if such bankrupt be present at any meeting of the said Commissioners, it shall be lawful for them to examine such bankrupt upon oath, either by word of mouth, or on interrogatories in writing, touching all matters relating either to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, and to reduce his answers into writing, which examination, so reduced into writing, the said bankrupt shall sign and subscribe; and if such bankrupt shall refuse to be sworn, or shall refuse to answer any questions put to him by the said Commissioners touching any of the matters aforesaid, or shall not fully answer to the satisfaction of the said Commissioners any such questions, or shall refuse to sign and subscribe his examination so reduced into writing as aforesaid (not having any lawful objection allowed by the said Commissioners), it shall be lawful for the said Commissioners, by warrant under their hands and seals, to commit him to such prison as they shall think fit, there to remain without bail until he shall submit himself to the said Commissioners to be sworn, and full answers make to their satisfaction to such questions as shall be put to him, and sign and subscribe such examination."

S. 39. "If any person be committed by the Commissioners for refusing to answer, or for not fully answering any question put to him by the said Commissioners, they shall in their warrant of commitment specify every such question: provided, that if any person committed by the Commissioners shall bring any *habeas corpus* in order to be discharged from such commitment, and there shall appear on the return of such *habeas corpus* any insufficiency in the form of the warrant whereby such person was committed, by reason whereof he might be discharged, it shall be lawful for the Court or judge before whom such party shall be brought by *habeas corpus*, and such Court or judge is hereby required, to commit such person to the same prison, there to remain until he shall conform, unless it shall be shown to such Court or judge by the party committed that he has fully answered all lawful questions put to him by the Commissioners; or if such person was committed for refusing to be sworn, or for not signing his examination, unless it shall appear to such Court or judge that he had a sufficient reason for the same: provided also, that such Court or judge shall, if required



committed to Newgate upon a warrant dated on that day, and which was as follows :

1847.

  
Ex parte  
MARTIN.

thereto by the party committed, in case the whole of the examination of the party so committed shall not have been stated in the warrant of commitment, inspect and consider the whole of the examination of such party, whereof any such question was a part ; and if it shall appear from the whole examination that the answer or answers of the party committed is or are satisfactory, such Court or judge shall and may order the party so committed to be discharged."

1 & 2 Will. 4, c. 56, sect. 1, after providing for the constitution of the Court of Bankruptcy, provides, that " the same Court shall be and constitute a Court of law and equity, and shall, together with every judge and Commissioner thereof, have, use, and exercise all the rights, incidents, and privileges of a Court of Record, or judge of a Court of Record, and all other rights, incidents, and privileges, as fully and to all intents and purposes as the same are used, exercised, and enjoyed by any of his Majesty's Courts of law or judges at Westminster."

S. 6. " The said six Commissioners may be formed into two Subdivision Courts, consisting of three Commissioners for each Court, for hearing and determining the matters and things, and making the examinations hereinafter referred thereto, and all references or adjournments by a single Commissioner to a Subdivision Court by virtue of this act shall be to the Subdivision Court to which he belongs, unless the said Commissioner, in case of the sickness of some one or more of the Commissioners of such Subdivision Court, or other sufficient cause, shall think fit otherwise to direct ; and the said Subdivision Courts may sit either in public or private as they shall see fit, unless where it shall be otherwise provided by this act, or by the rules to be made as hereinafter mentioned."

S. 7. " In every bankruptcy prosecuted in the said Court of Bankruptcy, it shall and may be lawful for any one or more of the said six Commissioners to have, perform, and execute all the powers, duties and authorities, by any act or acts of parliament now in force vested in Commissioners of bankrupt, in all respects as if they or any one or more of them were in every instance specially authorized and appointed for the purpose by a separate commission under the great seal of the united kingdom of Great Britain and Ireland : provided always, that no single Commissioner shall have power to commit any bankrupt or other person examined before him otherwise than to the care and custody of a messenger or other officer of the said Court, to be by him detained in his custody, and brought up before a Subdivision Court, or the Court of Review, within three days after such commitment, for which purpose one of such Courts shall be forthwith assembled, and to which Court such examination shall be adjourned."

1847.

Ex parte  
MARTIN.

“ In the matter of *William Martin*, a bankrupt.

“ At the Court of Bankruptcy, Basinghall Street, in the City of London, the 25th day of March, 1847 :

“ Whereas a fiat in bankruptcy, bearing date the 19th day of February, 1847, and directed to her Majesty's Court of Bankruptcy, was duly issued against *William Martin*, of No. 10, Skinner Street, Somers Town, in the parish of St. Pancras, in the county of Middlesex, grocer and tea dealer, which said fiat was duly filed and entered of record in the said Court, and the said *William Martin* hath been duly adjudged a bankrupt thereunder: And whereas the said *William Martin* did, on the 22nd day of March, 1847, surrender himself to *Edward Goulburn*, Serjeant at Law, one of the Commissioners of the said Court authorized to proceed in the said fiat, and did make and sign the declaration pursuant to the statute in that behalf: And whereas the said *Edward Goulburn*, in the execution of the powers and authority given to him by the several statutes made and now in force concerning bankrupts, did proceed to examine the said *William Martin* concerning matters touching his estate and effects, and propounded certain questions to the said *William Martin*: And whereas the answers given by the said *William Martin* to the said questions having been unsatisfactory to the said *Edward Goulburn*, he, the said *Edward Goulburn*, by his warrant under his hand and seal, bearing date the 22nd day of March, 1847, did duly commit the said *William Martin* to the care and custody of *James Cooper*, one of the messengers of the Court of Bankruptcy, to be brought up before a Subdivision Court: And whereas the said *William Martin* having been this day so duly brought by the said *James Cooper* before us, *John Samuel Martin For-*

*blanque* and *Edward Holroyd*, Esqrs., and *Edward Goulburn*, Serjeant at Law, Commissioners of the Court of Bankruptcy, whose names and seals are hereunto affixed, constituting a Subdivision Court, we proceeded to examine the said *William Martin* touching matters concerning his estate and effects, and he, the said *William Martin*, having duly made and signed the declaration pursuant to the statute in that behalf made and provided, we, in the execution of the powers and authorities given and granted by the several acts made and now in force concerning bankrupts, did cause several questions to be propounded to the said *William Martin*, which questions are hereinafter stated in the examination of the bankrupt hereinafter set forth, to which questions so put to him the said *William Martin* gave the several following answers thereto set forth respectively hereinafter in the said examination of the said bankrupt, which examination is as follows; that is to say,"

[The warrant then set out the questions and answers verbatim, and proceeded as follows:—

"Which answers of the said *William Martin* not being satisfactory to us the said Commissioners, these are therefore to will, require, and authorize you immediately upon the receipt hereof to take into your custody the body of the said *William Martin*, and him safely to convey to her Majesty's prison of Newgate, and him there to deliver to the keeper of the said prison, who is hereby required and authorized by virtue of the statutes aforesaid to receive the said *William Martin* into his custody, and him safely to keep and detain without bail or mainprize until such time as he shall submit himself to us or to any of the Commissioners of the said Court of Bankruptcy, and full answer make to our or their satisfaction

1847.

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EX parte  
MARTIN.

1847.

Ex parte  
MARTIN.

to the questions so put to him by us as aforesaid, and for so doing this shall be your sufficient warrant."

The bankrupt made an affidavit, whereby he deposed that on the 26th of April, 1847, he was taken (being then in custody) before Mr. Commissioner *Shepherd* at the Court of Bankruptcy, when and where he was requested to sign and did sign a declaration, such as is now usually signed by bankrupts in lieu of an oath prior to their examination; that after signing such declaration, Mr. Commissioner *Shepherd* asked him if he had any additional statement to make concerning the loss of the money, meaning thereby the loss of 140*l.*, mentioned and referred to in the warrant of his committal to Newgate aforesaid by the Subdivision Court, when he replied he had an additional statement to make respecting the loss of the money; that he then stated to Mr. Commissioner *Shepherd*, as such additional statement, that he had remembered, since his committal to prison, that he had informed his brother of the loss of the money about ten days after the loss thereof, and which circumstance he did not remember when he was before the Subdivision Court; that Mr. Commissioner *Shepherd* then inquired of him if that was all he had to say in addition to his former statement before the Subdivision Court, and that he said it was all he had to say in addition to such former statement; and that Mr. Commissioner *Shepherd* then said it did not alter the case. That the counsel appearing for the assignees then applied to Mr. Commissioner *Shepherd* to recommit the bankrupt to Newgate, when Mr. Commissioner *Shepherd* said, after consulting another Commissioner on the subject, he should not recommit, whereupon the bankrupt's counsel applied to Mr. *Shepherd* to order his discharge from

custody, but that Mr. Commissioner *Shepherd* said he should neither discharge nor recommit, and the bankrupt was thereupon taken back to Newgate upon the original warrant of commitment, and had since remained there.

On the 3rd of May he was brought up upon a *habeas corpus* before Mr. Justice *Erle*, when, after argument, he was remanded (a).

He then obtained another writ of *habeas corpus*, upon which he was now brought before his Honor the Chief Judge, sitting as Vice-Chancellor.

Mr. *Swanston* and Mr. *Sturgeon* for the bankrupt proposed to read his affidavit.

Mr. *Bacon* and Mr. *Duncan* for the assignees objected that the Court could only look to the return to the writ.

Mr. *Swanston* said that in *Coombe's case* (b) an affidavit was read, and the point had been expressly raised and settled in *Ex parte Lampon* (c), where the Lord Chancellor said "affidavits may certainly be read to show facts not apparent on the face of the warrant, otherwise there would be nothing to prevent Commissioners from making up a warrant stating the facts incorrectly, or altogether omitting them; and as London Commissioners are judges of record (1 & 2 Will. 4, c. 56, s. 1), they would not be liable to an action for so doing."

Mr. *Bacon* said that the application there was to the

(a) See *Ex parte Martin*, 11 Jurist, 369.

(c) 1 Mont. & Ayr. 249.

(b) 2 Rose, 396.

1847.

*Ex parte*  
MARTIN.

1847.

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Ex parte  
MARTIN.

jurisdiction in bankruptcy, and not to the Court of Chancery.

The VICE-CHANCELLOR held that the affidavit might be read, but said that if the assignees wished for time to answer it, his Honor was ready to hear an application for the purpose.

Mr. *Bacon* said that an affidavit on the part of the assignees had been read in the Court of Queen's Bench on the former application, and if that affidavit were allowed to be read in evidence now, the assignees were willing that the case should proceed. The deponent who had made the affidavit was now in Court.

The VICE-CHANCELLOR said that the best way would be to treat the application as one in bankruptcy as well as to him as Vice-Chancellor, and that then the affidavit might be resworn in Court before the Chief Registrar of the Court of Bankruptcy.

The affidavit was resworn, as follows:—

In Bankruptcy.

*James William Walsh*, of No. 68, Lincoln's Inn Fields, in the county of Middlesex, Gentleman, the solicitor to the assignees of the estate and effects of *William Martin*, late of No. 10, Skinner Street, Somers' Town, in the parish of St. Pancras, in the said county of Middlesex, grocer and tea dealer, a bankrupt, maketh oath and saith, that on the 19th day of February last a fiat in bankruptcy was duly awarded and issued against the said *William Martin*, under which he was duly declared and adjudged a bankrupt: and this deponent

further saith, that on the 22d day of March last the said *William Martin* surrendered himself under the said fiat to *Edward Goulburn*, Serjeant at Law, one of the Commissioners of Her Majesty's Court of Bankruptcy, and was thereupon examined touching his estate and effects; but the answers of the said *William Martin* to the questions propounded to him by the said *Edward Goulburn*, as such Commissioner as aforesaid, being unsatisfactory, the said *Edward Goulburn*, by a warrant under his hand and seal, committed the said *William Martin* to the custody of *James Cooper*, one of the messengers of the said Court of Bankruptcy, to be brought up pursuant to the statute before a Subdivision Court to be summoned for that purpose: and this deponent further saith, that on the 25th day of March last, the said *William Martin* being then in the custody of the said *James Cooper* under the said warrant of the said *Edward Goulburn*, was brought before *John Samuel Martin Fonblanque* and *Edward Holroyd*, Esqrs., two of the Commissioners of the said Court of Bankruptcy, and the said *Edward Goulburn*, sitting as a Subdivision Court in bankruptcy; and the said *William Martin* being then examined touching his estate and effects, and his answers to the questions propounded to him by the said Court being unsatisfactory to the said Court, the said *William Martin*, pursuant to the statutes in that behalf, was committed to her Majesty's gaol of Newgate: and this deponent further saith, that on or about the 24th day of April last a warrant under the hand and seal of the said *Edward Holroyd* was, as this deponent has been since informed, granted, directed to the keeper of her Majesty's said gaol of Newgate, requiring the said keeper to bring the body of the said

1847.

  
Ex parte  
MARTIN.

1847.

  
Ex parte  
MARTIN.

*William Martin* before *Henry John Shepherd*, Esq., a Commissioner of the said Court of Bankruptcy, on the 26th day of April last, to pass his last examination pursuant to the statute : and this deponent further saith, that the said warrant was obtained and granted without the knowledge, direction, consent or authority of this deponent, or of the said assignees, and this deponent or the said assignees were not informed, and did not know that the said *William Martin* would be so brought up until the morning of the said 26th day of April last, when this deponent saw the said *William Martin* in Court, and inquired how he came there : and this deponent further saith, that the said *William Martin* did not file his accounts and balance sheet within the time prescribed by the rules of the said Court of Bankruptcy, the said accounts not having been filed until the 24th day of April last ; and this deponent further saith, that the said *William Martin*, pursuant to the said warrant, was brought before the said *Henry John Shepherd*, as a Commissioner of the said Court of Bankruptcy, on the 26th day of April last, being the day named in the London Gazette upon which the said *William Martin*, pursuant to the statutes, should make his second surrender and appear to pass his last examination, when this deponent, on behalf of the assignees, declined to examine the said *William Martin* or put any questions, and protested against the said *William Martin* being examined or having any questions put to him ; and Mr. *Duncan*, who appeared as the counsel for the said assignees, did not put any questions to or examine the said *William Martin*, but, on the contrary, frequently protested against any questions being then put to him, as the said *William Martin* was not then entitled, by the rules of the said



Court of Bankruptcy to pass his last examination, or to be heard thereon, as his accounts and balance sheet had not been duly filed : and this deponent further positively saith, that the said *Henry John Shepherd* did not examine the said *William Martin* or put any question to him, but, at the instance of Mr. *Sturgeon*, who then appeared as the counsel for the said *William Martin*, the said *William Martin* signed the usual statutory declaration, and the said Mr. *Sturgeon* then proposed to examine the said *William Martin* himself, but the said *Henry John Shepherd* refused to allow the same. The said Mr. *Sturgeon* then stated that the said *William Martin* had a statement to make which would materially vary the examination upon which the said *William Martin* had been committed, and which, he submitted, would induce the said *Henry John Shepherd* to discharge the said *William Martin* out of custody: the said *Henry John Shepherd* upon this stated to the said *William Martin* that he would listen to and hear any voluntary statement the said *William Martin* had to make, but that he the said *Henry John Shepherd* should not urge him to make any statement, or ask him any question, or in any manner examine him. The said *William Martin* thereupon, at the instance, and by the desire and request of the said Mr. *Sturgeon*, repeated the statement he had made before the Subdivision Court, varying it in one particular only, namely, by stating that he had mentioned the alleged loss of the money to his brother about a fortnight after he alleged the loss took place: the said *Henry John Shepherd* having heard the statement, and also an address from the said Mr. *Sturgeon* on behalf of the said *William Martin*, urging the said *William Martin's* discharge, again repeated that he

1847.

Ex parte  
MARTIN.

1847.

Ex parte  
MARTIN.

should not ask the said *William Martin* any questions, as he concurred in the decision of the said Sub-division Court, and should not make any order for the discharge of the said *William Martin* as prayed by the said Mr. *Sturgeon*, or any other order in the matter; and no question was asked by the said Commissioner or the said assignees, or by their counsel, or by this deponent on their behalf, neither was the said *William Martin* examined by the said Commissioner, or by the said assignees, or by their solicitor or counsel: and this deponent further saith, the paper writing hereunto annexed and marked with the letter (A), is a true copy of the memorandum of the proceedings on the said 26th day of April last, as filed in the Court of Bankruptcy with the proceedings under the said fiat: and this deponent further saith, that the said *William Martin*, on the occasion of his being examined by the said *Edward Goulburn* on the said 22d day of March last, in reply to the following questions, that is to say, ‘What further step did you take?’ replied as follows, that is to say, ‘I did not take any further step: the clerk said a similar circumstance had occurred to a gentleman about a week or ten days after I mentioned it to my brother and *Allen*:’ and this deponent further saith, that the said question and answer are set forth in the herein-before mentioned warrant of the said *Edward Goulburn*.

The following was the Memorandum of the Commissioner on the proceedings:—

“In the Court of Bankruptcy.

“Basinghall Street, London, 26th day of April, 1847.

“Before Mr. Commissioner *Shepherd*.

“In the matter of *William Martin*, of No. 10,

Skinner Street, Somers' Town, in the Parish  
of St. Pancras, in the County of Middlesex,  
Grocer and Tea Dealer, a Bankrupt.

1847.

Ex parte  
MARTIN.

" Memorandum. Whereas the said *William Martin*, the person against whom the fiat now in prosecution was awarded and issued, being in custody by virtue of a warrant of commitment under the hands and seals of three of the Commissioners of the Court of Bankruptcy, sitting as a Subdivision Court, whereby he was committed to her Majesty's gaol of Newgate, and this being the day, pursuant to notice in the London Gazette, for hearing the bankrupt's last examination, the said *William Martin* was brought up before me by warrant under the hand and seal of *Edward Holroyd*, Esq., one of the Commissioners of the Court of Bankruptcy, according to the statutes in that case made and provided: and whereas it appeared to me that the said bankrupt had not filed his balance sheet within the time required by the rules of Court, I did adjourn the last examination of the said bankrupt until Thursday the 6th day of May next, at two o'clock in the afternoon: and whereas the said *William Martin* having been heard by me, reiterated the same statement which he made to the three Commissioners sitting as a Subdivision Court as aforesaid, with the sole addition that he had communicated the fact of his loss to his brother a fortnight after it had happened, and showing no sufficient cause why I should discharge him, whereupon I did not make any order in the matter. *H. J. Shepherd.*"

Mr. *Swanston* and Mr. *Sturgeon* for the bankrupt.  
The warrant set out in the return is bad, for it does not show that the Subdivision Court was properly constituted.

1847.

  
Ex parte  
MARTIN.

Moreover it ought to set out the whole of the examinations, as well that before the Commissioner, to whom the answers were, in the first instance, unsatisfactory, as that before the Subdivision Court. The conclusion of the warrant is also bad, for the Subdivision Court had no authority to commit the bankrupt until he should submit "to us or to any of the Commissioners of the said Court of Bankruptcy, and full answer make to our or their satisfaction, to the questions so put to him by us as aforesaid," these not being the words of the acts, which only require that he shall answer such questions "as shall be put to him." Under the present law, it is sufficient if the answer be satisfactory to the Commissioner acting in the prosecution of the fiat, for he has now all the authority (except that of commitment to Newgate) which the three Commissioners had under the old law. Independently of these fatal objections, the bankrupt must be discharged, because the warrant cannot be considered as setting out the grounds on which the bankrupt is now in prison, there having been, since the execution of the warrant, a subsequent examination, and the unsatisfactory answers to this last examination being the reason, or some of the reasons, for the bankrupt's remand. There ought to have been a fresh warrant, so that the whole cause of the prisoner's detention might appear on the return. This was expressly decided by Lord Eldon in *Coombe's case* (a), and *Brown's case* (b). They also referred to *Crowley's case* (c).

Mr. Bacon and Mr. Duncan for the assignees. Mr.

(a) 2 Rose, 396.

(c) Buck, 264, and 2 Swanst. 1.

(b) 2 Rose, 400.

Commissioner *Shepherd* had no power when sitting alone to examine the bankrupt on this subject, which was the ground of his committal by the Subdivision Court. The bankrupt was brought up for his last examination before that learned Commissioner, but according to the rules in bankruptcy he was not entitled to pass his last examination. He then volunteered a statement. That circumstance could make no difference as to his remaining in the custody to which he had been committed by the Subdivision Court, and from which no single Commissioner had power to discharge him. Mr. Justice *Erle* expressed his opinion that the prisoner could not be discharged except by the Subdivision Court. The following reasons given by that learned judge for the prisoner's remand are, we submit, unanswerable: "I think there is nothing in any of these objections. The Subdivision Court is a Court of Record; it is quite sufficient that the warrant states that it was made by such a Court, without showing how it was constituted. It is to all intents and purposes a valid Court, and it was quite unnecessary to state by what process it was called together; the warrant, therefore, shows sufficient jurisdiction, and it was unnecessary to state that the Commissioners were summoned. The chief question is, whether or not the warrant ought to have shown the former examination, which took place before the single Commissioner, and before the Subdivision Court was summoned, and it was said we ought to have it shown what was the examination before such Commissioner. But we are dealing here with the commitment of the Subdivision Court. They were bound to form their own opinion of the conduct of the bankrupt, and if they had allowed their minds to be prejudiced by what had taken

1847.

  
Ex parte  
MARTIN.

1847.

  
Ex parte  
MARTIN.

place at another time, they would not have done their duty. The bankrupt is committed upon their warrant, and they were right in not setting out an examination that did not take place before them. Then it is said the return should have set out what took place on the subsequent examination before the single Commissioner; but the commitment is, that he be kept in Newgate until he shall full answer make to their satisfaction, following the terms of sect. 36 of 6 Geo. 4, c. 16. It is therefore a continuing commitment, to be removed only when he makes satisfactory answer, and what took place, therefore, upon the last occasion before the Commissioner had nothing whatever to do with the case. He was merely asked if he had anything to add, and on making some answer, he is told that his answer is not satisfactory; it seems to me, therefore, that there was no occasion for any allusion to this proceeding. The statement made by the bankrupt I think was unsatisfactory; for though a story may be uncontradicted by witnesses, it may be so unsatisfactory and improbable on the face of it as to deserve no credit. There was quite ground enough for the Commissioner saying the statement was unsatisfactory (a)." [The *Vice Chancellor*. It is a very important question whether a man cannot be discharged from prison without the concurrence of three minds.] Under the old bankrupt law it was necessary that the three Commissioners should agree in committing or discharging a person, and, therefore, when we now insist that no power but that of the Subdivision Court can commit or discharge, we are maintaining no new proposition. We insist that Mr. Commissioner *Shepherd* had no power to discharge the prisoner, even if he had examined him, but we also deny that the Commissioner did in fact examine him.

(a) 11 Jurist, 369.

In *Coombe's case* (a), the Commissioners, who had power to examine the bankrupt, sent him back on a second and illegal warrant. The bankrupt then was brought up for the specific purpose of being examined on the matters which formed the subject of his commitment. In *Re Lord* (b), it was decided by the Court of Exchequer that the conclusion of the warrant adopted in the present case was sufficient, and the point had been already decided in *Ex parte Dauncey* (c), notwithstanding the same objection was taken in those cases as has been suggested now. The Commissioner here would not examine the bankrupt, and would make no order, and, therefore, there cannot be considered to have been any recommitment or remand. The prisoner was permitted to be absent from the walls of the prison for a temporary purpose unconnected with the subject of his commitment, but was never out of custody under the warrant, nor did anything occur to change the authority under which he was detained.

1847.

Ex parte  
MARTIN.

The CHIEF JUDGE.—My impression is that it is not necessary that the bankrupt's further examination in such circumstances as those of the present case should be satisfactory to three Commissioners, or to a Sub-division Court, but that, on submitting to be examined by the Commissioner to whose particular jurisdiction the fiat belongs, and answering to his satisfaction, the bankrupt is entitled to his discharge, and that it is competent to that Commissioner to discharge him.

If this view of the case be correct, and being a view in favor of freedom, it is that which in a case of ambiguity (if ambiguity there be) ought to be preferred,

(a) 2 Rose, 396.

(b) 11 Jurist, 186.

(c) 12 M. &amp; W. 271.

1847.

  
Ex parte  
MARTIN.

then I doubt much the legality of the warrant, because the words of the commitment are, "until such time as he shall submit to us, or to any of the Commissioners of the said Court of Bankruptcy, and full answer make to our or their satisfaction."

It is not necessary, however, for me to decide that question, and I avoid deciding it, for I am of opinion that the bankrupt having appeared before Mr. Commissioner *Shepherd*, and having submitted to be examined (although not brought thither for that purpose) upon the subject, for not answering with respect to which he had been committed, and Mr. *Shepherd* having been willing to receive, and having sat there to receive, such further information as the bankrupt was willing to give (though I do not say whether he might or might not have declined to receive it), I am of opinion that in this state of circumstances, according to *Coombe's case*(a), and *Brown's case*(b), and independently of those authorities, upon the reason and good sense of the matter, there ought to be a record of that examination,—a proposition to which I feel confident that Mr. Commissioner *Shepherd* would have acceded had his attention been called to it.

I think the bankrupt must be discharged, therefore, on the return to the habeas corpus, and on the affidavit of the bankrupt, and the affidavit filed in bankruptcy on behalf of the assignees, including the statement made by the Commissioner.

(a) 2 Rose, 396.

(b) 2 Rose, 400.





1847.

**Ex parte FLOWER.**—In the matter of **FLOWER.**

June 2.

**THIS** was the petition of the bankrupt. The respondent was a creditor, who had proved under the fiat for 15*l.* 17*s.*, and no dividend having been declared, he proceeded against the bankrupt for the debt in the Middlesex County Court. It was insisted there, on behalf of the bankrupt, that the proof was an election, and was an answer to the proceeding, but the judge considered himself precluded by the authorities from attending to this circumstance. The bankrupt now sought by his petition an injunction to restrain the respondent from further proceedings in the County Court. It appeared that the respondent had opposed the certificate, which had been suspended for six months.

A creditor who has proved, restrained from proceeding for the same demand in the County Court, although there is no dividend.

Mr. *Macnaghten* supported the petition.

Mr. *Swanston*, for the respondent, contended that, by proving, a creditor did not elect conclusively; and that where the estate paid no dividend (a) he might proceed at law.

Mr. *Macnaghten*, in reply, submitted that since the 6 *Geo.* 4, c. 16, s. 59, the act of proving was an election, without reference to the declaration of a dividend; and he referred to *Ex parte Chambers* (b).

The CHIEF JUDGE held that the proof amounted to an election, that the injunction must be granted, and that the respondent must pay the costs of the petition.

(a) See *Ex parte Sharpe*, 11 Ves. 202, and *Ex parte Callow*, 3 Ves. 1, as to the law on this subject before 6 *Geo.* 4, c. 16, s. 59.

(b) M. & M'A. 130.

1847.

June 8, 9, 23,  
28.

July 14.

A creditor, who before the fiat has taken a bankrupt in execution, cannot be heard on the merits of his petition to stay the certificate, unless he discharges the bankrupt.

A fiat issued by a bankrupt against himself may be legally and equitably valid, although he may have been party to acts of fraudulent preference.

It is not sufficient ground for annulling such a fiat that it was issued mainly for the purpose of protecting the bankrupt against proceedings at law, or without a predominant wish to benefit his creditors.

Where at the time of a fraudulent preference the bankrupt was a trader, and there remains due a debt which was then owing, and which would support a creditor's fiat, *semble*, that such fraudulent preference may be impeached under the bankrupt's own fiat.

*Held*, that such a fraudulent preference does not of itself constitute a sufficient ground for annulling such a fiat against the bankrupt's consent, at the instance of a creditor, who proposes to sue out a fresh fiat, especially, if there be any doubt as to the competency of such creditor to sue out a fresh fiat.

*Quere*, whether a creditor who detains a bankrupt in execution till he is discharged by his certificate is competent, if the fiat be annulled, to issue a new one.

*Quere*, whether, on the first fiat being annulled, the creditor can again take the body of the debtor in execution or whether the debt is satisfied.

Petitioner making improper and unjustifiable charges ordered to pay all the costs, though he succeeds as to a part of his petition.

**Ex parte JOSEPH NORTON.**—In the matter of **JOHN ROBINSON and THOMAS TURLAY.**

**AT** the Summer Assizes, 1846, and before the issuing of the fiat, the petitioner recovered adversely a verdict for 1162*l.* against the bankrupts, (who were share brokers at Leeds), in an action of assumpsit.

On October 16, 1846, the bankrupts filed a bill to restrain execution. The petitioner, on putting in his answer obtained an order *nisi* to dissolve the common injunction, which had issued for want of an answer, and the bankrupts showed cause on the merits against dissolving the injunction.

On the 18th of January, 1847, the injunction was dissolved, and they were informed thereof at Leeds on the morning of the 19th of the same January, and on that or the following day filed a declaration of insolvency, and applied thereupon in the usual way that a fiat might be issued against them, and on the 21st of the same January a fiat in bankruptcy was thereupon issued against them.

On the 22nd of January they were adjudicated bankrupts, and *Roger Kynaston* (since deceased) was appointed the official assignee.

Previously to the issuing of the fiat, and on the 19th

of the same January, the bankrupt *Turlay* was arrested on a writ of *capias ad satisfaciendum*, issued by the petitioner upon his judgment, and the bankrupt *Turlay* was still imprisoned, and remained in execution.

On the 16th of February, 1847, a creditors' assignee was appointed under the fiat; on the 4th of March, 1847, the bankrupts passed their last examination; and the 27th of March, 1847, was appointed for hearing their application for their certificates of conformity, which application was accordingly heard, and was opposed, and the Commissioner postponed his judgment thereon; but on the 20th of May, 1847, he gave his judgment, allowing each of the certificates.

The petitioner had never made or tendered any proof or claim of debt under the fiat; but on the 17th of May, 1847, he presented the present petitions, consisting of an original and supplemental petition, stating at great length a variety of circumstances, with the view of impeaching the equitable validity of the fiat, as well as the validity of various transactions between the bankrupts and other parties, which were alleged to amount to acts of fraudulent preference, and praying that the fiat might be annulled, to the intent that the petitioner might sue out another against the bankrupts, and that the certificates might be stayed.

Mr. *Russell*, for the petitioner, asked that the petition might stand over, to give the petitioner time to file affidavits in reply to some of the respondents' affidavits, which had been just filed.

Mr. *Swanston* and Mr. *Amphlett* for the bankrupts.

1847.

Ex parte  
NORTON.

June 8.

1847.

Ex parte  
Norton.

It is contrary to the practice of the Court to direct a petition to stay a certificate to stand over, to file affidavits in reply. In *Ex parte Gardner (a)*, Lord Eldon said, "The practice, as far as concerns the certificate, is to hear the petition, and then for me to say whether any further affidavits are necessary." And the practice has so continued; *Ex parte Bostock (b)*; *Ex parte Alsop (c)*. Moreover, the petitioner still keeps one of the bankrupts in execution, and while this is the case he cannot be heard against the certificate of that bankrupt. In *Ex parte Lord (d)* the point was expressly decided, for it being there argued that the creditor was only bound to relinquish his proceedings at law upon proving or entering a claim, and not on merely opposing the certificate, Lord Eldon said, "I cannot stay the certificate without having an undertaking that the creditor who presents the petition will prove, and if he undertakes to prove, I must allow the bankrupt the benefit of the act." [The Chief Judge. At that time the proof entitled the creditor arbitrarily to assent to or dissent from the certificate. Does the principle apply now, when his opposition must be made on valid grounds? In *Ex parte Lord* the application was to stay the certificate, to give the petitioner an opportunity of proving.] In *Ex parte Blaydes (e)*, Lord Eldon said, "With respect to the bankrupt's discharge, I must have arrived at my conclusion in that case of *Ex parte Lord* by reasoning it in this manner; that though it may be difficult to say that the presentation of a petition by a person seeking to prove and stay the certificate, as a creditor whose debt

(a) 1 Rose, 378.

(d) 2 Rose, 421.

(b) 1 D. &amp; C. 388.

(e) 1 Gl. &amp; J. 179.

(c) 3 M. D. &amp; De G. 180.

would turn it, was either proof or claim within the letter of the statute; yet as the staying the certificate is in the sound discretion of the Court, where the steps taken are similar, where the mischief is the same, the Court will apply the equity of the statute; the identity of mischief forms a legislative rule for the exercise of the discretion of the Court. Presenting such a petition is as much a pledge to prove, as entering a claim would be; and this petition cannot be entertained, unless the petitioner claims to establish himself as a creditor under the commission. The petitioner is in this difficulty, if I do not make an order the bankrupt is discharged by his certificate; if I do make an order, he must be discharged under the equity of the statute." [The *Chief Judge*. In that case also the petition was an application to prove.] But Lord *Eldon* does not mention that as the ground of his judgment. [The *Chief Judge*. Those authorities were decided before the 6 Geo. 4, c. 16, passed, the 59th section of which act provides generally, that any creditor may be heard against the allowance of the certificate.] But there was a provision equally extensive under the former law. For the 10th section of 5 Geo. 2 provided that the certificate should be allowed and confirmed by the Lord Chancellor, Lord Keeper, or Commissioners for the custody of the Great Seal of Great Britain for the time being, or by such two of the justices of the Court of King's Bench, Common Pleas, or barons of the Court of Exchequer at Westminster, to whom the consideration of such certificate should be referred by the Lord Chancellor, Lord Keeper, or Commissioners of the Great Seal for the time being; and the clause then proceeded as follows: "And any of the creditors of such bankrupt are to be allowed to be heard, if they shall think fit, before the respective

1847.

Ex parte  
Norton.

1847.

Ex parte  
Norton.

persons aforesaid against the making such certificate, and against the confirmation thereof, nor shall any Commissioner sign such certificate till after four parts in five in number and value of the said creditors shall have signed the same as aforesaid." [The *Chief Judge*. The latter part of that section shows that the creditors who were to be allowed to be heard were those who were to sign the certificate, that is, those who had proved. His Honor referred to *Ex parte Whitchurch* (a) and *Ex parte Ramsbottom* (b).] We submit that the word "creditors" in the 6 *Geo.* 4, c. 16, s. 59, as well as in the 5 & 6 *Vict.* c. 122, s. 39, must mean creditors who intend to take the benefit of the enactment; and if such a creditor presents a petition, he must discharge the bankrupt from any other process which he may have against him. That has been so decided since the 6 *Geo.* 4, c. 16, was passed, in the case before cited of *Ex parte Bostock* (c). In *Ex parte Alsop* (d) your Honor held that under the 5 & 6 *Vict.* c. 122, the certificate must be allowed, unless the Court was satisfied that the bankrupt had not conformed, or that there was some ground for impeaching his conduct as a trader.

Mr. *Russell* in reply.

The CHIEF JUDGE.—I wish to know whether there is any instance of a certificate having been stayed at the instance of a person who had never proved or sought to prove?

Mr. *Russell*. The point was raised in *Ex parte*

(a) 1 G. & J. 71; 2 Jac. & Walk. 548.

(b) 2 Christ. B. L. 501.

(c) 1 D. & C. 390.

(d) 3 M. D. & D. 180.

*Cullen (a)*, where the provisional assignee, under a joint commission, petitioned to stay a certificate under a separate commission against one of the bankrupts. Lord *Eldon* dismissed the petition, on the ground that no misconduct was imputed to the bankrupt; but there is no intimation of opinion that a creditor might not oppose on the ground of misconduct, although he did not seek to prove. The authorities have all been cases of creditors who sought to avail themselves of the arbitrary power of dissenting, which they had under the old law, and, to enable them to exercise which, a proof under the commission was a condition precedent. In *Ex parte Williamson (b)*, Lord *Hardwicke* said: "One question will be, whether *Williamson* has been guilty of fraudulent concealment, to the prejudice of his creditors; and another question, whether the petitioners are persons qualified to be creditors under this commission, and to assent or dissent to the bankrupt's certificate." His Lordship decides both points in the negative; whereas, if the argument of the respondents was correct, it would have been sufficient to have decided the latter. But whatever might have been the decisions under the old law, the present act, 5 & 6 *Vict. c. 122*, s. 39, expressly provides that any creditor may be heard; and it is clear that the expression is not to be confined to creditors who have proved; because in other sections, as the 36th and 55th, where such creditors are alone meant, the language is restricted accordingly.

1847.

Ex parte  
Norton.

The CHIEF JUDGE.—At the commencement of the argument I doubted very much whether it was not competent for a person, who had recovered judgment in an

(a) *Buck*, 68.(b) 1 *Atk.* 82.

1847.

Ex parte  
Norton.

action of debt or assumpsit against the bankrupt, and had the bankrupt's person in execution under that judgment, to be heard on a petition to stay the certificate, without having proved or having any intention to prove a debt under the fiat; but, as the argument proceeded, and as the authorities were brought under my attention, that doubt diminished considerably; and I have been much struck with the fact, that no case has been produced in which the Lord Chancellor, or the Court exercising the jurisdiction formerly exercised by the Lord Chancellor, has stayed the certificate on the application of such a person. That being so, my present impression is, that a creditor having the bankrupt in execution cannot be heard upon an application to stay the certificate, without discharging the bankrupt from custody. I cannot order him to discharge the bankrupt; but I can decline to proceed on his petition to stay the certificate unless he does.

HIS HONOR directed the case to stand over till the next day, that search might be made for precedents.

June 9.

*Mr. Russell. Ex parte Joseph (a)* was the petition of a creditor who had not gone in or sought to prove under the commission, but held the bankrupt in execution. In that case the ground of opposition to the certificate was fraudulent concealment on the part of the bankrupt, and it did not appear to have occurred to Lord *Eldon*, that, to a petition to stay the certificate on such grounds, it was a sufficient answer to say that the creditor did not seek to prove, but held the bankrupt in execution. It was clear that Lord *Eldon* did not conceive that the cre-

(a) 1 Rose, 184; 18 Ves. 340.



ditor could not be heard, for he did, in fact, hear and decide the petition on the merits; and this conclusion is further supported by the following passages in the judgment:—"When a person who has proved comes forward to stay a certificate on grounds of concealment, he brings forward two propositions: first, that I ought not to affect the debt by granting it; and secondly, that what the bankrupt has done perhaps amounts to a capital felony. If he leaves it in doubt whether there has been a concealment or not, it is a duty to the bankrupt to grant his certificate, and let him try it at law. But at law a person never could be admitted to say he was informed and believed that such concealment had taken place. When a person who has not proved comes here, he comes in a public right, and is *quasi* a public prosecutor, and I ought, *à fortiori*, to say to him, try your question at law. It is clear that a concealment, even of five shillings above the amount specified, makes the consequence the same under the act, and that upon a positive statement of such concealment, however much I may lament that the party has not chosen another tribunal, I must withhold the certificate." [The *Chief Judge*. Lord *Eldon*, however, in a subsequent part of the judgment, seems to allude to the objection that the petitioner held the bankrupt in execution as one which might possibly prevail. In the report in *Vesey*, the words are, "I make no observation upon the act of the petitioner taking the bankrupt in execution while the petition was depending; but if by taking a course directly adverse to the proceedings under the commission, the petitioner has placed himself under such circumstances that he cannot have the validity of the certificate examined in a civil proceeding, that situation is the effect of his own choice,

1847.

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Ex parte  
NORTON.

1847.

Ex parte  
NORTON.

the law having now, most properly as I think, established that a creditor shall not come in under the commission for the purpose of relief, at least unless he waives his personal remedy against the bankrupt.”] Still, if Lord *Eldon* had thought that ground sufficient, it would have relieved him from the other troublesome questions in the case. [The *Chief Judge* referred to *Ex parte Hardenburgh* (a).] In that case the bankrupt petitioned to be discharged from imprisonment under an attachment at the suit of a creditor who had taken the bankrupt after the issuing the commission, and had then presented a petition, not merely to stay the certificate, but praying an inquiry into circumstances impeaching the validity of the commission, and for leave to prove, and for a new choice of assignees, in the event of the commission not being superseded; and Lord *Eldon* thereupon said, “There is not in this case the difficulty which has been urged a point of jurisdiction, whether, if a creditor comes here merely to remove the commission or certificate out of the way of his proceeding at law, I should consider him as coming in under the commission, and restrain him from proceeding at law.” And the order was made expressly on the ground that the creditor sought an inquiry, and ought to abide the result.

THE CHIEF JUDGE.—It seems that there is no trace of an order having been made to stay a certificate under the circumstances of the present case. If no such case can be found in the office, I must, considering the authorities cited yesterday, put the petitioner to his election.

Mr. *Russell* said the petitioner could not consent to

discharge the bankrupt out of custody on account of other proceedings.

1847.

Ex parte  
NORTON.

The CHIEF JUDGE.—Then let the petition be dismissed so far as it seeks to stay the certificate of the bankrupt *Turlay*. In other respects let the petition stand over, with liberty for the petitioner to file affidavits in reply.

Affidavits were filed accordingly.

The result of the evidence on both sides (as afterwards stated in a special case) was in favor of the validity of the fiat at law, and did not establish that it was issued with the view or for the purpose of being the means of fraud or an instrument of fraud, or was issued otherwise than fairly. It appeared that the pressure of the proceeding of the petitioner at law was mainly or solely the cause of the bankrupt's suing out the fiat: that *John Everard Upton* was the bankrupts' solicitor, and acted as such for them in issuing the fiat, and in all the matters aforesaid in which they had a solicitor: that the said *John Everard Upton* was also appointed and acted as the solicitor for the assignees under the fiat: that no case of collusion, of fraud, of negligence, or of other misconduct, was established against the assignees and their solicitor, or any or either of them; but that certain acts of the bankrupts before the fiat, which were alleged by the petitioner to have been acts of fraudulent preference, had a suspicious appearance sufficient to justify the allowing of the petitioner (he desiring it and indemnifying the assignees) to contest the same at his own risk in the assignees' names, though not sufficient to establish a case of fraudulent preference, or to justify an order or direc-

1847.

  
Ex parte  
NORTON.

tion to the assignees, or either of them, to contest the validity of the acts in question.

This appeared to be also the state of the case with respect to certain portions of the bankrupt's estates which were alleged by the petitioners to be outstanding and capable of being recovered, but which, it appeared, the assignees declined attempting to recover, alleging that they viewed any such step as one of a rash and improper kind.

The petitioner admitted that, except the demand upon which he recovered the judgment, and except the judgment, he had not any provable debt; but he insisted that the said action was well founded, and that, whether it was well or ill founded, the judgment was conclusive. It was admitted by the petitioner and by the other suing parties, that the bankrupts were traders before and at the time when the earliest of the acts alleged to be acts of fraudulent preference took place, and had so continued to the time of the existing fiat; and that before and at the time when the earliest of such acts took place, the bankrupts owed debts to the amount of 200*l.* and upwards, which had continually remained and were still due and unsatisfied.

June 21 and 23.

The petition now again came on to be heard on the questions reserved.

Mr. *Russell*, Mr. *Anderdon* and Mr. *Bagshawe* for the petitioner. The facts, appearing upon the affidavits, show that there are several transactions between the bankrupt and other persons which might be successfully impeached as fraudulent preferences, if there existed a fiat under which this could be done. But it

seems difficult to hold, consistently with the principle of decided cases, that any such transaction could be impeached under the bankrupt's own fiat; and this, therefore, would constitute a ground for annulling the existing fiat, to enable the petitioner to sue out a fresh one, which may be available for that purpose. One of the cases alluded to is *Tope v. Hockin* (a), in which Lord *Tenterden* clearly laid down the principle on which the Court proceeded. He said, "The plaintiffs endeavoured to overreach these payments by proof of an act of bankruptcy committed on the 1st of October. That act of bankruptcy was the execution of a deed conveying all the bankrupt's goods and chattels in Devonshire, the county of his residence, to one *Henry Mudge* and this *John Lyndon*, for the purpose of discharging a debt due to them. *Lyndon* was privy to this transaction, and therefore, taking the deed to be an act of bankruptcy, it is clear, by all the authorities, that *Lyndon* could not be allowed so to treat it, and to take out a commission upon it. But it was argued, that although the law might be so as to the suing out a commission, yet if the commission were sued out upon another distinct act of bankruptcy sufficient to sustain it, the creditors represented by the assignees (*Lyndon* not being an assignee) might nevertheless avail themselves of this act of bankruptcy, for the purpose of avoiding subsequent acts by force of the relation to this deed. We, however, think that the reasons upon which the creditors at large are not allowed to avail themselves for the purpose of supporting the commission of an act, which the petitioning creditor is not allowed to call an act of bankruptcy, although another creditor

1847.

Ex parte  
Norton.

(a) 7 B. &amp; C. 701.

1847.

  
*Ex parte*  
NORTON.

might do so for that purpose, apply equally to the present purpose for which they rely upon it. One reason must be, that the creditors at large are to be considered as connected with the petitioning creditor, and as deriving their rights under the commission from him; for if they were not so considered they might say, Here is a good act of bankruptcy, and a sufficient debt owing to the petitioning creditor; his connection with the act of bankruptcy is immaterial to us; there are many among us to whom debts were owing of sufficient amount to have authorized us to sue out a commission; and therefore in our favor the commission shall stand good. Another reason may be, that if a commission, sued out by such a petitioning creditor, could be available, he would have a right to prove his debt under it, and participate in the dividend, and so would derive a benefit from a commission which he ought not to have sued out, and thus take advantage of his own wrong; and this reason also will be applicable to the purpose for which the act of bankruptcy in October is insisted on; for if the plaintiffs can avail themselves of that, they will increase the fund to be divided, and *Lyndon* will participate in that increase."

Your Honor, in *Ex parte Philpot* (a), held that this principle applied to the case of a bankrupt suing out a fiat against himself; but as the circumstances of that case did not require the Court to decide how the matter would have stood, if there had happened to be a creditor who could have sued out a fiat under which the transaction there in question might have been successfully impeached, your Honor did not decide the question, but confined the application of the principle to

(a) *Ante*, 345.

the facts of the case. We submit, however, that the question left undecided must, when it arises, be disposed of in the same way as *Ex parte Philpot* was; and that when there is occasion to consider the effect of the existence of a creditor who might impeach a transaction which the bankrupt cannot impeach, it will be held that such a circumstance cannot make any difference where the fiat is sued out by the bankrupt. It could only be material with a view of substituting a petitioning creditor for the bankrupt; but the act which enables a trader to sue out a fiat against himself provides no means of substituting for him any other person as a petitioner for the fiat; nor if the 18th section of 6 Geo. 4, c. 16(a), could by possibility be held to apply to such a case in other respects, could it be so made available, having regard to the proviso that the new petitioning creditor's debt shall have been incurred not anterior to the old debt, a restriction which was introduced for the express purpose of preventing transactions from being overreached, where the fiat is supported by the new petitioning creditor's debt, which could not have been overreached without the substitution of that debt. That section shows that the date of the petitioning creditor's debt is very material. If the petitioning creditor's debt was not incurred when the impeached transaction took place, it was no injury to him, and he

1847.

Ex parte  
NORTON.

(a) 6 Geo. 4, c. 16, s. 18. "If after adjudication the debt or debts of the petitioning creditor or creditors, or any of them, be found insufficient to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor or creditors, having proved any debt or debts sufficient to support a commission, provided such debt or debts has or have been incurred not anterior to the debt or debts of the petitioning creditor or creditors, to order the said commission to be proceeded in, and it shall by such order be deemed valid."

1847.

Ex parte  
Norton.

cannot complain of it, nor can any coming in under a process originating with him.

The CHIEF JUDGE. Have you any case in which the question arose before Mr. *Fordyce's case* (a)? Every one admits that the date of the petitioning creditor's debt is material with regard to the period of the act of bankruptcy; but is it so, with regard to a fraudulent preference, considered otherwise than as an act of bankruptcy?

Mr. *Swanston* and Mr. *Amphlett* for the bankrupts and the assignees. The fact of this petitioner having kept one of the bankrupts in prison till he was discharged by his certificate, is a sufficient answer to the petition; for it is clear that the petitioner could not sue out a new fiat if this were annulled, both because the petitioner's debt is satisfied by his execution, and he is no creditor, and because he has thereby made his election. In *Cohen v. Cunningham* (b) the plaintiff was taken in execution upon a judgment, at the suit of the defendant *Cunningham*, for the sum of 776*l.* 18*s.* 5*d.*, and he remained so charged in execution until the 24th of the same month. During that time a docket was struck against him by *Cunningham*, and a commission upon *Cunningham's* petition founded on the same debt for which the plaintiff was so charged in execution. Lord *Kenyon*, C. J., said, "I have seen the whole proceedings in *Burnaby's case*, and it appears from thence that all the great men in Court at that time, and amongst others Lord *Hardwicke* himself, had been

(a) *Harman v. Fisher*, Cowp. 125.

(b) 8 T. R. 123.



engaged in the cause, so that the opinion of the Court was formed upon much consideration, and therefore the decision ought not to be lightly shaken. Even upon principle it seems to me to be an anomalous case, that a creditor, who has made his election to proceed against the body of his debtor, should afterwards be able by his own act to change the nature of his execution and pursue his debtor's property. It is certainly contrary to the general rule of law. *Burchall's case*, it is true, was determined by a lawyer of the first eminence; but it is not clear to me how the fact there was. If *Burchall* were not in execution at the time when the commission issued, but was taken afterwards (though it is extraordinary that one who had sued out a commission should have been suffered to proceed at law), then the two cases may be reconciled." [The *Chief Judge*. Is there any instance in which a creditor, who has kept the bankrupt in custody under an execution until he is discharged by his certificate, has been allowed to prove under the fiat?] None; but there is an express authority to the contrary in *Ex parte Mudie* (a). Nor could the petitioner, if the fiat were annulled, take either of the bankrupts into custody, because there was only one debt due from the two, and that has been satisfied by the imprisonment under the execution. [The *Chief Judge*. I should require authorities to convince me that the bankrupt could not be retaken under the execution if the fiat were annulled. But suppose, according to *Ex parte Mudie*, the petitioner could not prove under the present fiat, may he not nevertheless be heard on his petition to annul, if this were a petition for that purpose only? The ob-

1847.

Ex parte  
Norton.

(a) 3 M. D. & De G. 66.

1847.

Ex parte  
NORTON.

jection seems to be that it is a petition for the particular purpose of issuing a new fiat.] With regard to what are called fraudulent preferences, there is no ground for the argument that such transactions cannot be set aside under the bankrupt's own fiat. The doctrine of relation, or the date of the petitioning creditor's debt, has nothing whatever to do with setting aside a transaction amounting to a fraudulent preference. The only purpose for which the date of the petitioning creditor's debt is material, is with reference to the date of the act of bankruptcy. Neither in *Cooke v. Rogers* (a), nor *Flook v. Jones* (b), or any of the other cases, is any question raised as to the date of the petitioning creditor's debt. [The *Chief Judge*. I understand it to be admitted on both sides, that at the time of the earliest of the alleged acts of fraudulent preference, that is in November, 1846, the bankrupts were traders and owed a sufficient amount (which is due) to support a creditor's fiat.] Fraudulent preferences are subject to the same rules as fraudulent deeds within the acts of *Elizabeth*. Now with regard to a fraudulent deed, the House of Lords in *De Gols v. Ward* (c) held that it might be set aside under a commission, supported by a debt of later date. There is no ground therefore on which the fiat ought to be annulled. Nor can the Court impound it, the certificate having been granted, because it might be pleaded at law, and a bill of discovery might be filed if necessary to establish the fact.

Mr. *Russell* in reply. In the long series of authorities on the subject of fraudulent preference which are arranged chronologically in *Christian's Bankrupt*

(a) 7 Bing. 438.

(b) 4 Bing. 20.

(c) 1 Bro. P. C. 376.

Law (a), most of the acts of fraudulent preference in question were by deed, and were therefore in themselves acts of bankruptcy. It cannot be inferred from the circumstance that the period when the petitioning creditor's debt was incurred is not stated in them, that in any of them it was subsequent to the transaction sought to be impeached. In many of them it is clear it could not have been. The principle is that a person who was not a creditor at the time is not wronged by the transaction, and cannot impeach it; nor can persons coming in under a process sued out by him. With regard to *Cohen v. Cunningham* (b), that case has always been disapproved of, and has never been considered to be law. The proposition that an execution under a *ca. sa.* is a satisfaction of the debt, is at variance with the well established practice that a creditor who has the debtor in prison under such a process may elect at any time before the declaration of a dividend to discharge the debtor and prove (c). How could he prove, if the debt were satisfied?

1847.

Ex parte  
Norton.

The CHIEF JUDGE.—This matter is before the Court July 14, upon two petitions presented by Mr. *Joseph Norton*. The respondents are the two bankrupts, Mr. *Fairclough* (the creditors' assignee) and Mr. *Upton* (his and the bankrupts' solicitor), besides Mr. *Kynaston* (the official assignee), who is now dead. The parties, I believe, agreed to proceed with the case without serving and without the appearance of Mr. *Kynaston's* successor. There is a voluminous body of evidence on behalf of the petitioners and the respondents respectively, some portions of

(a) Page 123, et seq.

(b) 8 T. R. 123.

(c) See *Ex parte Hopkinson*, 1 Ves. jun. 159; *Ex parte Callow*, 3 Ves. 1; *Ex parte Sharp*, 11 Ves. 203; *Ex parte Grosvenor*, 14 Ves. 587.

1847.

  
Ex parte  
Norton.

which are material and others not so. The first petition (not a short or a condensed document), and the examinations and affidavits that have been brought before the Court, are of very considerable bulk certainly.

Mr. *Norton* petitions as a creditor of the bankrupts, which the respondents do not admit that he is. Certainly he has not proved under the fiat. His title or alleged title is that a special contract had been made between him and the bankrupts, which they (as he says) had broken, so as to entitle him to recover damages against them; and having accordingly brought an action of assumpsit against them, he, before the bankruptcy, had obtained adversely upon a verdict judgment against them for a considerable sum in the action. And it is true that he did bring an action of assumpsit against them, in which, before the bankruptcy, he recovered a verdict and judgment against them adversely for a large sum. The verdict may or may not have been founded on sufficient evidence or sound reasoning. A new trial was, however, not granted, nor was a rule nisi for that purpose applied for successfully, if at all. The respondents nevertheless assert that justly and on the merits the action ought to have failed, which the petitioner denies. The petitioner, however, asserts, while the respondents deny, that, under the bankruptcy, the judgment is conclusive evidence of the truth and validity of the demand appearing to be constituted by it. A bill in equity, impeaching the claim which was the subject of the action, was filed before the bankruptcy, but without any result, except that the answer of the petitioner was held sufficient to displace an injunction; and I collect that the suit—that is the chancery suit—has been dropped.

The body of one of the bankrupts was before the bankruptcy taken in execution upon the judgment, and

continued in execution upon the judgment until a time subsequent to the presentation of the first petition, and I rather think until a time subsequent to the presentation of the second petition, my impression being that it was the confirmation of the allowance of his certificate, to which I am about to refer, that procured that bankrupt's enlargement from imprisonment under the judgment. The respondents assert and the petitioner denies that this circumstance alone is decisive against the petitioner's title to prove under the fiat, even if otherwise he could have proved, which the respondents deny and the petitioner of course asserts. It is true, indeed, that, as I have said, the petitioner has not proved, and that, except as I have mentioned, it does not appear that he is in any sense a creditor. I am not sure whether—apart from the question of the effect of taking, or detaining the body of the bankrupt taken, in execution—the petitioner ought or ought not to be considered a creditor, if the judgment ought not to be considered conclusive. Whether I ought to consider it as conclusive I give no opinion. I assume, however, that the petitioner had when each of the petitions was presented, and has now, against the bankrupts, or their estate, a demand or title entitling him to be heard in the bankruptcy.

The prayer of the first petition is in these words: "That the fiat issued against the bankrupts may be annulled, and that a new fiat may be issued in the place thereof, your petitioner hereby offering forthwith to apply for and procure the same to be issued on his petition and founded on his debt; and that all the costs of and occasioned by the fiat, including the costs incurred by or on the behalf of the said *George Norton*, occasioned by the assertion of his said claim and the investigation of the

1847.

Ex parte  
NORTON.

1847.

Ex parte  
Norton.

estate and affairs of the said bankrupts on the part of your petitioner, but in the name of the said *George Norton*, and in and about the opposition to the allowance of the certificates of the said bankrupts under the said fiat, and of and incidental to the said application and consequent thereon, to be taxed as between solicitor and client, or otherwise, as this Honorable Court may think fit, may be ordered to be paid by the said *John Everard Upton*, *Roger Kynaston* and *John Fairclough*, or some or one of them, or out of the estate of the said bankrupts; and that the said *John Everard Upton*, and *Roger Kynaston*, or one of them, may be ordered to make good to the estate of the said bankrupts under the said new fiat the said sum of 64*l.* 1*s.* 7*d.* so as aforesaid paid out of the said estate to the said *John Everard Upton* as hereinbefore mentioned; and that they may respectively be ordered to account for all the monies and effects belonging to the said estate which have come to their hands respectively; and that some person other than the said *Roger Kynaston* may be appointed the official assignee of the said estate and effects under such new fiat, or that otherwise all the proceedings under the said existing fiat subsequently to the adjudication thereunder may be declared to have been fraudulent and void, and may be vacated accordingly."

The second petition prays thus :—"That the allowance of the bankrupts' said certificates may not be confirmed by this Honorable Court until after the said hereinbefore mentioned petition shall have been heard; and that the same may not be confirmed, or if at all confirmed, not until the said bankrupts respectively have refunded to their estate the said two several sums of 40*l.*, and save on such terms and conditions as shall appear to this

Honorable Court just; and that the said petition may be heard as a supplemental petition to and at the same time with the said before mentioned petition; and that such before mentioned petition may be heard, and such order made thereon as may be just, so far as the several respondents thereto, other than the said *Roger Kynaston*, are concerned, notwithstanding the death of the said *Roger Kynaston*; and that this Honorable Court will make such order as to the costs of the petition as may be proper; and that all the costs of and occasioned by such proceedings, including such costs as aforesaid, may be ordered to be paid in manner aforesaid, or that this Honorable Court will make such order in relation to the said costs as may be just; and that the said *John Fairclough* may be removed from being creditors' assignee under the said fiat, and some proper persons or person may be appointed creditors' assignees or assignee under the said fiat; and that the said *Roger Kynaston* may be removed from being official assignee under the said fiat; and that some other person may be appointed official assignee thereunder; and that if necessary the said several debts proved by Messrs. *Stansfield and Wise, John Fairclough* and *William Ambler* respectively may be duly investigated, your petitioner hereby offering to undertake such investigation, and to submit to such order as this Honorable Court may make touching the costs of such investigation; and that until after this petition shall be heard, the certificates of the said bankrupt, if the same shall be allowed by the said Commissioner, may not be confirmed." And I may here observe that this is a case in which the bankrupts made themselves bankrupts under a recent act of parliament. There was no petitioning creditor, nor, if the fiat was not issued with

1817.

  
Ex parte  
Norton.

1847.

  
Ex parte  
NORTON.

the view and for the purpose that it should be the means of fraud or an instrument of fraud, is its legal validity disputed.

The fiat having issued in January last, the adjudication of bankruptcy took place in the same January. Mr. *Fairclough* was chosen assignee soon afterwards. The learned Commissioner allowed the certificates in the month of May, after considerable opposition. This allowance was in the interval between the presentation of the first petition in the same May, and the presentation of the second petition.

The two petitions were in hearing before the Court on several days; and with regard to the bankrupts' certificates, I have already decided, after fully hearing the case against them, that as the certificates here and before the Commissioner were opposed chiefly and mainly, if not solely, on grounds available at law if existing in truth—on grounds, that is, which if shown to exist must render the certificates, though confirmed here, useless; and as (neither certificate having been opposed on any ground substantiated to my satisfaction) there was not in my judgment more than a case of doubt—if so much as a case of doubt, against either of the certificates—the confirmation of their allowance ought not to be withheld or delayed. This, however, was expressly without prejudice to the liability (if any) of the fiat to be annulled, or to the question whether it should be annulled on these petitions.

I have not upon reflection discovered any reason for thinking that opinion erroneous, and I am now, after an attentive consideration of the whole matter, able to say, that unless this fiat was issued with the view and for the purpose that it should be the means or an instrument of



fraud, and is upon that ground a fiat unfit to be permitted to stand, it is clear to me that not anything should have been done on these petitions to stay or interfere with the certificate of either bankrupt or to prejudice it.

I must think, therefore, that if the fiat was not issued with such a view and for such a purpose, it ought not, for any object of convenience or otherwise, to be annulled against the bankrupts' consent. If, however, it had been proved, or there were sufficient grounds for judicial suspicion, that this fiat was issued with the view and for the purpose that it should be the means or an instrument of fraud, it would probably be the duty of the Court to annul it, or institute an investigation in order to ascertain whether it was so issued. I think, however, that there is no such proof, and that there are not sufficient grounds for such a suspicion.

It is a different question whether there have been fraudulent preferences. I assume, for the sake of the argument, that there have been. The fiat may, nevertheless, I conceive, be legally and equitably valid. Nor is it material that it was issued (if it was so) for the purpose mainly and chiefly of affording the bankrupts such protection as it might afford them against the consequences of the proceedings at law against them, and without a predominant or active wish to benefit or assist their *bonâ fide* creditors.

With regard to the contention, that there have been fraudulent preferences, I think it right, whether, considering the questions raised in that respect as questions of fact and law, or as questions merely of fact, to say that I am not convinced or persuaded that there has not or that there has been any fraudulent preference. I doubt whether there has not been one act at least of that

1847.

  
Ex parte  
Norton.

1847.

Ex parte  
NORTON.

nature. But the persons in whose favor those alleged acts are said to have taken place are not before the Court, and I decline saying more on the subject, except as to the question raised and argued, whether, under the existing fiat, the fraudulent preferences (if any) can be impeached.

Now it being admitted, or being upon the materials before me proper, I think, to be believed, that at the time of the earliest act alleged to have been a fraudulent preference, the bankrupts were traders, and had at least one creditor, now remaining wholly unsatisfied, whose debt was sufficient to support a petitioning creditor's fiat at any time during the interval between that act and the present fiat, this question ought, as I conceive, to be answered in favor of the present fiat, that is, in favor of the competency of impeaching, under it, the fraudulent preferences if there were any.

Supposing this view of the actual state of the law to be incorrect, that state, in my judgment (if I may consider myself at liberty to express the opinion), ought not to be permitted by the legislature to continue. Perhaps, however, a decision upon that point is not here necessary. It is not necessary, if the petitioner, supposing the present fiat to be placed out of his way or impounded, could not effectually be a petitioning creditor for a fiat against the bankrupts; and I think it doubtful whether he could be. It is perhaps superfluous to add, that I think it doubtful whether, this fiat standing, he is entitled or can entitle himself to prove under it.

To remove Mr. *Fairclough*, or to direct even prospectively or contingently his removal from the assigneeship upon these petitions, would, I conceive, be manifestly improper.

I think, upon the whole of the evidence, that there is no case for it, even upon the assumption of the petitioner being a creditor, or being certain to be admitted a creditor under the fiat. It appears to me that Mr. *Fairclough's* conduct, the conduct of Mr. *Kynaston*, and the conduct of Mr. *Upton*, though largely attacked, have not been attacked upon sufficient or reasonable grounds; but I am disposed to give the petitioner liberty, if he shall succeed in procuring himself to be admitted a creditor under it, to proceed (at his own costs in the first instance at least) to impeach the proofs that he disputes, and the payments or acts that he alleges to have been fraudulent preferences, and for this purpose to use the assignees' names, indemnifying them.

In all other respects, however, the petitions, in my judgment, fail, and must be dismissed. They fail, therefore, in the judgment of the Court for the most part, and almost wholly; and although the Court allows the petitioner to take, to some extent, contingently at least, an order upon them, I am not sure that this, upon such petitions, is not more than he is strictly entitled to. Had he abstained from petitioning until he had been admitted (as he has not yet been and possibly may never be) to prove under the fiat, or had he sought that which he has obtained and nothing else, the very heavy expense that these petitions must have caused, might have been, to a very great extent, and perhaps almost, if not altogether, saved. This, however, upon the question of costs, is not, by any means, all. Without deeming it necessary to intimate what I think of the manner in which the second petition is worded, I must say that the first (the principal) petition, and some of the affidavits filed on behalf of the petitioner, contain imputa-


1847.

Ex parte  
NORTON.

1847.

Ex parte  
NORTON.

tions and charges against various persons, expressed in a manner intemperate, and something more,—of a gross kind, most discreditable and disgraceful, if true, to the persons parties and not parties thus attacked, and to some extent, probably, of a criminal nature, in the legal as well as moral sense of the word “criminal,” which appear to me, upon my view of the evidence, to be, I do not merely say not established and not justifiable, but without excuse. Adding, though I do not know that it is necessary to add to this, that the course of proceedings, which, since the bankruptcy, has taken place on the petitioner’s behalf with reference to the matters in dispute, has otherwise been, in my judgment, of an oppressive description, I find it impossible with propriety to exempt him from any part of the costs of the petitions to this time: he must pay the whole. But I will reserve the question whether, if he shall succeed in displacing or reducing either of the proofs disputed by him, or in establishing as a fraudulent preference either of the acts alleged to be fraudulent preferences, he shall be allowed in those respects, or either of them, any part of his costs of the petition out of the estate; and he may have liberty to apply accordingly, and to apply also as to the costs of such, if any, proceedings as he may take successfully in the assignees’ names under the present order.



Ex parte CHARLES FORTESCUE TAGART.—In  
the matter of FRANCIS MACKIE.

1847.

June 28.

**THIS** was the petition of an equitable mortgagee by deposit of deeds, accompanied by the following written memorandum:—

A lessee annexed tenant's fixtures, and then deposited the lease, by way of mortgage, with a memorandum, not noticing the fixtures. *Held*, on his becoming bankrupt, that the security extended to the fixtures.

“ Be it remembered, that on the 21st day of June, in the year of our Lord 1845, the title deeds and writings relating to all the piece or parcel of ground, with the messuage or tenements thereon erected, being No. 14 on the east side of Southampton Row, in the parish of St. George's, Bloomsbury, in the county of Middlesex, held under the Duke of Bedford, with the premises thereto belonging, and their appurtenances, &c., which are the property of the undersigned *Francis Mackie*, were delivered to and deposited by me with *Charles Fortescue Tagart*, of Gray's Inn, in the said county, gentleman, in pledge to secure to the said *Charles Fortescue Tagart* the sum of 100*l.* this day lent and advanced by the said *Charles Fortescue Tagart* (the receipt whereof I do hereby acknowledge), with interest for the same after the rate of 5*l.* per cent. per annum; and I the said *Francis Mackie* do hereby engage and agree, upon request of the said *Charles Fortescue Tagart*, his executors and assigns, to execute a legal mortgage of the said leasehold house and premises, with their appurtenances, to the said *Charles Fortescue Tagart*, his executors, administrators and assigns, at my own expense; and also that I will keep insured the said messuage and premises in the Sun Fire Office, in the same sum in which they are now insured, and pay the annual premium for the same as a security for the repayment of the said sum of 100*l.* and interest as aforesaid: as wit-

1847.

Ex parte  
TAGART.

ness my hand the day and year first above written.  
*Francis Mackie.* Witness, *Charles Hepburn.*"

The petition, and the petitioner's affidavit in support of it, stated that at the date of the deposit there were in and upon the premises valuable freehold and trade fixtures attached and belonging thereto, all which said fixtures were the property of the bankrupt, and that it was intended and agreed by and between the petitioner and the bankrupt, that the same should be comprised in and be, and the same were subject to the said equitable mortgage or deposit.

The lease and fixtures had been sold. By arrangement between the parties, the question as to the title to the fixtures was to be decided in the same way as if the petition sought the usual order for sale.

Mr. *Hardy* in support of the petition. In *Ex parte Broadwood* (a) the express point was decided by this Court as then constituted, and that authority was followed in *Ex parte Bentley* (b).

Mr. *Russell* for the assignees. In *Ex parte Broadwood* the memorandum contained a schedule of the fixtures belonging to the premises, and in *Ex parte Bentley* the deed creating the security contained the word "appurtenances." But here it cannot be contended that any thing passed by the memorandum except what was included in the lease. [The *Chief Judge*. Must not the case be considered as if the lease were assigned?] *Trappes v. Harter* (c) is, in that view of the case, a decisive authority in favor of the assignees.

(a) 1 M. D. &amp; D. 631.

(c) 2 Crom. &amp; Mees. 153.

(b) 2 M. D. &amp; D. 591.

Mr. *Hardy* in reply. The memorandum contains an agreement to execute a legal mortgage of the premises "with their appurtenances," which would of course include the accretions made by the annexation of the fixtures. This circumstance brings the case completely within the authority of *Ex parte Bentley* (a). In *Longstaff v. Meagoe* (b) it was held that an assignment passes all the fixtures then upon the premises, although they are not mentioned in the deed of assignment; and the same point was decided in *Hare v. Horton* (c), *Colegrave v. Dias Santos* (d) and *Ex parte Belcher* (e).

1847.

Ex parte  
TAGART.

The CHIEF JUDGE.—I think that whatever might be the proper decision upon principle, if there were no authority on the point, there is sufficient authority to warrant me in extending the petitioner's security to the fixtures.

The ORDER declared that the petitioner was an equitable mortgagee of "the leasehold messuage or tenement, fixtures and premises, mentioned in the said petition," and directed the usual accounts.

(a) 2 M. D. & D. 591.

(d) 2 B. & C. 76.

(b) 2 Ad. & El. 167.

(e) 2 M. & A. 160; 4 D. & C. 703.

(c) 5 B. & Ad. 716.

1847.



Ex parte THOMAS PAYNE.—In the matter of  
JOHN TAVERNER.

June 30 and  
August 3.

The 5 & 6 Vict.  
c. 122, s. 8,  
providing that  
no fiat shall be  
invalid by reason  
of the act of  
bankruptcy  
being concerted,  
does not enable  
a creditor to sue  
out a fiat founded  
on a trust deed  
executed with  
his concurrence,  
and such a fiat  
may be annulled  
at the instance  
of another creditor.

**THIS** was the petition of a creditor to annul the fiat for want of an act of bankruptcy.

The fiat was sued out by two creditors, named *William Bindloss* and *Edmund Preston*, and the act of bankruptcy relied upon, and upon which the adjudication proceeded, was the execution of a trust deed, dated the 29th day of May, 1847, whereby the bankrupt assigned all and singular his estate and effects, in trust for the general benefit of his creditors, unto a Mr. *William Fitzherbert Chadwick*, who was not at the time of the execution of the deed a creditor of the bankrupt.

The affidavits in support of the petition stated that the bankrupt was instigated to execute the deed by Mr. *Chadwick*, who said that he acted in the matter as the agent for and on behalf of the petitioning creditors, *William Bindloss* and *Edmund Preston*.

It was sworn that the deed was prepared at the instance of the petitioning creditors, and was sent by them to a Mr. *James Knight* (an accountant whom they employed,) for the purpose of being executed by the bankrupt, and that such deed was finally completed by Mr. *Knight*, who attested the execution of the same by Mr. *Chadwick*.

Mr. *Hallett* in support of the petition.

The CHIEF JUDGE desired to hear the counsel who supported the fiat.

Mr. *Swanston* and Mr. *Follett* for the petitioning cre-



ditors. There is no doubt that the execution of the deed is an act of bankruptcy, and the only objection made to it is, that the petitioning creditors concurred in it, in other words, that it is a concerted act of bankruptcy. Now this might have been a valid objection before the passing of the new act, 5 & 6 *Vict.* c. 122, but it is no longer any reason for invalidating the fiat, the 8th section of that act providing, "that no fiat in bankruptcy shall be deemed invalid by reason of any act of bankruptcy of the person against whom the adjudication of bankruptcy thereunder shall be made having been concerted or agreed upon between the bankrupt and any creditor or other person, save and except where any petition to supersede or annul a fiat for any such cause shall have been already presented and shall be now pending." [The *Chief Judge*. Can a party who accepts a benefit given him by a deed sue out a fiat upon it as an act of bankruptcy?] Such a proceeding might affect the equitable validity of the fiat, if it were impeached by the bankrupt, but no one else has a right to complain of it. In *Simpson v. Sikes* (a) the Court held that a deed conveying the whole of a trader's effects on trust was an act of bankruptcy, although executed by the trader for the purpose of constituting such an act. In *Marshall v. Barkworth* (b) it was decided that the 1 & 2 *Will.* 4, c. 53, s. 42, providing that no fiat shall be annulled by reason of the fiat being concerted between the petitioning creditor and the bankrupt, did not give validity to fiats, where the act of bankruptcy was concerted. It was in order to supply that defect in the clause that the 5 & 6 *Vict.*

1847.

Ex parte  
PAYNE.

(a) 6 *Mau. & Sel.* 295.(b) 4 *B. & Ad.* 508.

1847.

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Ex parte  
PAYNE.

c. 122, s. 8, was passed; but if it be decided that a fiat can nevertheless be annulled on the sole ground that the petitioning creditor concurred in the act of bankruptcy, the object of the clause will be wholly defeated, and indeed it seems impossible to decide without contravening its express terms. They also referred to *Garrard v. Lord Lauderdale* (a).

The CHIEF JUDGE.—I assume that the deed (b) in this case purports to be executed for the benefit of the creditors generally; that the petitioning creditors were entitled to the benefit of the trusts declared by the deed and accepted that benefit. On these assumptions, I only desire to hear the petitioner's counsel on the question whether the respondents should not be allowed, if they desire it, the opportunity of trying at law the question of the validity of the fiat.

Mr. *Hallett* for the petitioner. There is not sufficient doubt in the case to entitle the respondents to have the decision postponed. In *Tope v. Hockin* (c) it was expressly decided, not with reference to any objection respecting the act of bankruptcy being concerted, but on general principles, that a person could not impeach an instrument to which he was a party; and that his incapacity to avoid his own act even communicated itself to the assignees chosen under a fiat sued out by him, it being considered so clear that he could not even indirectly be the means of contravening his own contract. And

(a) 3 Sim. 1; 2 Russ. & M. 451.

(b) The deed was not produced, and its production was not insisted on by either party.

(c) 7 B. & C. 101.

in the case of *Marshall v. Barkworth* (a), cited on the other side, Mr. Justice *Taunton* in his judgment puts the case on its true ground when he says, "This deed of assignment purports to be executed for one purpose, and a party to it endeavours to make it enure to another. He cannot avail himself of his own fraud." The reasoning is equally applicable to the present case, and shows clearly what the decision of a court of law would be.

1847.

Ex parte  
PAYNE.

The CHIEF JUDGE.—I think the execution of the deed in this case was not an act of bankruptcy as regards the petitioning creditor; but the respondents may have either an opportunity of trying the question at law, or may have liberty to go before the Commissioner, for the purpose of supporting the fiat by establishing some other act of bankruptcy.

The respondents preferred the latter alternative, and the following order was made.

This Court doth order, that the said respondents be and they are at liberty to go before the said Commissioner acting in the prosecution of the said fiat, and to tender in support of the said fiat evidence of any acts of bankruptcy committed by the said bankrupt in the said petition mentioned; and the said respondents are to give three days' notice to the said petitioners of all such alleged prior acts of bankruptcy, if any, which they intend to offer in evidence before the said Commissioner. And this Court doth order,

(a) 4 B. & Ad. 511.

1847.


  
Ex parte  
PAYNE.

that the said respondents do commence their said inquiry before the said Commissioner on or before Wednesday the 7th day of July; and the said petitioner is to be at liberty to appear before the said Commissioner; and this Court doth reserve the costs of all parties of and occasioned by the said petition; and the said parties or any of them are to be at liberty to apply to this Court relating thereto as they shall be advised; and in other respects this Court doth order the matter of the said petition to stand over.

*August 3.*

The petition was again placed on the paper on this day to be disposed of, when it appeared by the affidavit of the petitioner's solicitor that the respondents had not prosecuted the inquiry before the Commissioner.

The COURT annulled the fiat with costs against the petitioning creditors.



1847.

**Ex parte PETER MORRISON and FREDERICK FOVEAUX WEISS.**—In the matter of the **LONDON AND BIRMINGHAM EXTENSION, and NORTHAMPTON, DAVENTRY, LEAMINGTON AND WARWICK RAILWAY COMPANY**, now or late of No. 15, Old Jewry Chambers in the City of London, against whom a fiat in bankruptcy hath issued as a commercial trading company.

**THIS** was the petition of two of the directors of a company called the “London and Birmingham Extension, and Northampton, Daventry, Leamington and Warwick Railway Company,” which had been provisionally registered under the 7 & 8 Vict. c. 110, and against which a fiat had issued under the 7 & 8 Vict. c. 110. The prayer was that the fiat might be annulled.

By the subscribers’ agreement of the company, dated the 16th of August, 1845, the petitioners and twelve other persons were appointed a committee of management or directors; and it was among other things declared, that the majority of the members of the committee of management for the time being, present at any meeting of the committee of management, consisting of not less than five members, should have power to bind all present as well as absent members of the committee, as also of the general body of subscribers.

*June 30 and July 12 and 14.*

Directors of a bankrupt public company ordered by the Commissioner to prepare the balance sheet, in pursuance of 7 & 8 Vict. c. 111, may petition to annul the fiat without alleging that they are shareholders.

On such a petition it is necessary to serve some party who may represent the directors and shareholders (if any) who desire the fiat to stand, although the company has been dissolved under 8 & 9 Vict. c. 28, for upwards of three months, and the fiat is sued out by

parties in the character of creditors.

The 7 & 8 Vict. c. 111, s. 4, providing that a copy of the declaration and minute therein mentioned shall be received as evidence, and that no further evidence shall be required of the act of bankruptcy mentioned in the clause, does not preclude a party disputing the bankruptcy from showing that the declaration and the resolution were unauthorized by the subscribers’ agreement.

A clause in the subscribers’ agreement, empowering the majority at any meeting of not less than five directors to bind the rest and the company, does not authorize a meeting of three to do so, although they are unanimous, and the other directors are summoned and fail to attend.

1847.

Ex parte  
MORRISON  
and another.

At a meeting of the intended company, held on the 1st July, 1845, Messrs. *Wright* and *Hanbury* were appointed solicitors to the company, and continued to act as such solicitors down to the period of its dissolution.

In pursuance of the powers vested in the committee of management of the undertaking, application was made to parliament for an act for carrying the same into effect, but without success.

On the 10th of September, 1846, a meeting of the shareholders of the company was convened and held under the act for facilitating the dissolution of railway companies (9 & 10 *Vict. c. 28*), and a sufficient number of shareholders having attended to constitute a meeting under the act, resolutions were duly passed, declaring that the company should be dissolved, and that such dissolution should not be an act of bankruptcy (a).

Afterwards it was considered by some of the directors that it was desirable to wind up the affairs of the company under a fiat; and a circular letter was sent to each director, summoning a meeting of the board for the 22nd of March, 1847, at the offices of Messrs.

(a) 9 & 10 *Vict. c. 28, s. 23*. "That in addition to the question of dissolution, it shall be imperative on the meeting to decide whether such dissolution shall or shall not be taken to be an act of bankruptcy, for the purpose of having the affairs of the company wound up under the provisions of the act aftermentioned."

Sect. 24. "That in case the meeting shall resolve that the affairs of the company shall not be so wound up, or in the case of a railway to be made in Scotland, if the majority shall resolve in favour of dissolution, then (subject to the power hereinafter given to the committee, and to creditors of the company to petition for a fiat) the affairs of the said company shall be wound up, according to the rules applicable to the dissolution of partnership undertakings, and as if the undertaking had been dissolved by mutual consent."

*Ashurst* and Son solicitors, for the purpose of considering the propriety of passing a resolution, and of passing the same in pursuance of 7 & 8 *Vict.* c. 111. s. 4(a). On that day three directors or members of the committee, and no more, assembled, of whom a Mr. *W. F. Black* was one; and they proceeded to pass, and passed unanimously, a resolution, appointing Messrs. *Ashurst* and Son solicitors of the company; and a further resolution, declaring the that the company was then unable to meet its engagements, and that a declaration of insolvency should be forthwith filed in the office of the Lord Chancellor's Secretary of Bankrupts, in the form directed by the statute.

A declaration of insolvency, bearing date the 22nd

1847.

Ex parte  
MORRISON  
and others.

(a) 7 & 8 *Vict.* c. 111, s. 4. "That if any such company or body shall, by virtue of a resolution to be duly passed in that behalf at a board of directors of such company or body, duly summoned for that purpose, file or cause to be filed in the office of the Lord Chancellor's Secretary of Bankrupts a declaration in writing in the form specified in the schedule (A.) No. 1, hereunto annexed, that the said company or body is unable to meet its engagements, and also a minute of such resolution in the form specified in the said schedule (A.) No. 2, such declaration and minute of resolution respectively being under the common seal of such company or body, and if such company or body have no common seal, then signed by the chairman of the board of directors who was present at the passing of such resolution; and in either case such declaration and minute of resolution, being respectively attested by the attorney or solicitor of the said company or body for the time being, every such company or body shall be deemed thereby to have committed an act of bankruptcy at the time of filing such declaration, provided a fiat in bankruptcy shall issue against such company or body within two calendar months from the filing of such declaration; and a copy of such declaration and minute of resolution respectively, purporting to be certified by the said secretary or his clerk as a true copy, shall be received as evidence of such declaration and minute of resolution respectively having been filed by such company or body; and that upon such evidence being given, and upon proof by the attesting witness of the sealing or signature, as the case may be, of the said declaration and minute of resolution, no further evidence shall be required of the said act of bankruptcy."

1847.

Ex parte  
MORRISON  
and others.

March, 1847, was accordingly signed by Mr. *Black*, therein described as chairman of the board of directors, who was present at the passing of the resolution, and was witnessed by *William Henry Ashurst* the younger as solicitor to the company, and was filed in the office of the Lord Chancellor's Secretary of Bankrupts.

On the 18th May, 1847, the fiat issued on the petition of two creditors, and the company were adjudged and declared bankrupt. An official assignee had been appointed, but no creditors' assignees or assignee had been chosen.

By an order dated the 4th June, 1847, of the Commissioner, that the petitioners, and also Mr. *William Shaw* and Mr. *Black*, four of the persons who at the date of the fiat in bankruptcy against the company or body were directors or members of the committee of management of the company or body, were directed to prepare the balance sheet and accounts of the bankrupt company, in such form as was usual in matters of bankruptcy in the Court of Bankruptcy; and should subscribe such balance sheet and accounts and file the same, and deliver a copy thereof to the official assignee appointed under the fiat, ten days at least before the 5th of July, or such other day as the Court should appoint for the last examination under the fiat.

The grounds on which the validity of the fiat was disputed by the petition were:—that the company was not a commercial trading company, or liable to be made bankrupt within the intent and meaning of the statutes relating to bankrupts; that the company had not committed an act of bankruptcy; and that there was no valid petitioning creditor's debt sufficient to support the fiat.



The petition stated that the petitioners had been, from the time of the formation of the company up to the time of the issuing of the fiat, and had ever since been and still were, two of the directors or members of the committee of management of the company.

1847.

Ex parte  
MORRISON  
and others.

Mr. *Bacon* and Mr. *Glasse* supported the petition.

Mr. *Russell* and Mr. *Hawkes*, for the bankrupts, took a preliminary objection that none of the other directors were served with the petition. They said that the majority of the shareholders of the company, as well as of the directors, were in favor of the fiat. The Commissioner had ordered that four of the directors should prepare the balance sheet. This was the petition of two of those gentlemen only. Surely some one or more of the committee of management ought to have an opportunity of being heard, whereas no one but the petitioning creditor and the official assignee had been served with the petition. The company itself was wholly unrepresented.

Mr. *Bacon* and Mr. *Glasse*. Those who were directors of the company are no longer directors, the company being dissolved under the provisions of Lord *Dalhousie's* Act<sup>(a)</sup>. It is true that the act provides (s. 27) that it shall be lawful for any three of those who were of the committee of any company so dissolved, at any time after the dissolution thereof, or for any creditor or creditors of such company, to such amount as is now by law requisite to support a fiat in bankruptcy in England and Ireland, or a sequestration in

(a) 8 & 9 Vict. c. 28.

1847.

Ex parte  
MORRISON  
and others.

Scotland, within three months after the dissolution thereof shall have been resolved, to petition that a fiat in bankruptcy may issue against such company if in England or Ireland, or that the estates of the company may be sequestrated in Scotland. But in this case the fiat is sued out by creditors long after the expiration of the three months limited by the act for them to sue out a fiat. The proceeding, therefore, was wholly invalid, and it is competent for the petitioners upon whom an order is made, under the illegal process, to have that process set aside, without incurring the delay and expense of bringing before the Court any parties except those who have taken part in the irregularity. [The *Chief Judge* referred to *Richardson v. Larpent* (a)] There is this difference between that case and the present, that this company has been improperly declared bankrupt, and that if the fiat proceeds, the petitioners must either obey the Commissioner's order, which they think contrary to law, or they must suffer penalties for disobeying it.

The CHIEF JUDGE.—The petitioners are two only out of a number of twelve or fourteen persons, who at the time when the company was dissolved were at all events its managing and governing body, whether under the name of committee of management or of directors. That is admitted. It is further admitted, that not one of these twelve or fourteen persons has been served with this petition; that of the persons who have not thus been served, it appears, that some dissent from the view taken by the petitioners, and desire that the fiat should not be annulled; and that of these persons some one at least is

(a) 2 Y. & C. C. C. 507.

within the jurisdiction of the Court. In such a state of things, I think that the petition cannot be heard, except for the purpose of making some interim order as to the proceedings before the Commissioner until some of the other parties shall have been served. Of course no one has imagined that every shareholder should be here. It will be sufficient to have some one representing those directors who take a different view from the petitioners before the Court.

1847.  
  
 Ex parte  
 MORRISON  
 and others.

The petition was ordered to stand over.

July 12.

Mr. *Black* and two other directors having been served, the petition was again placed in the paper.

Mr. *Bacon* and Mr. *Glasse* for the petitioners. This fiat is invalid on many grounds.

1. Because the company was never a commercial or trading company or any other company, within the scope of the act 7 & 8 *Vict.* c. 110.

2. If it ever were such a company, it had been dissolved before the issuing of the fiat, and the act of the 7 & 8 *Vict.* c. 110, only applies to existing companies.

3. No resolution was passed at a board of directors constituted according to the provisions of the act.

4. The petitioning creditor's debt is insufficient.

The *Chief Judge* desired first to hear the respondents on the question respecting the constitution of the board at which the resolution was passed.

Mr. *Russell* and Mr. *Hawke* for the petitioning creditors. The 4th section of the 7 & 8 *Vict.* c. 111, after providing that a declaration and minute of resolution, signed by the chairman, shall be filed, provides that a

1847.

Ex parte  
MORRISON  
and others.

copy of such declaration and minute of such resolution respectively, purporting to be certified by the secretary or his clerk as a true copy, shall be received as evidence of such declaration and minute of resolution respectively having been filed by such company or body; and that upon such evidence being given, and upon proof by the attesting witness of the sealing or signature, as the case may be, of the said declaration and minute of resolution, no further evidence shall be required of the said act of bankruptcy. The evidence prescribed by the act exists here, and the Court cannot look beyond it. [The *Chief Judge*. Does the act, in providing that no further evidence shall be required, provide that that evidence shall be conclusive?] That is necessarily implied when it is provided that no further evidence shall be required. But there is no ground for impeaching the evidence here. The three directors were unanimous, and therefore it was immaterial whether the other two were present or not, as their votes would have made no difference. The greatest inconvenience would arise from holding that their mere presence was requisite, for the result would be that by refusing to attend they might, although a minority, effectually prevent the competent majority from securing for the company the benefit of the statute, whereas if they attended they could not effect any such result. The object of the act would thus be entirely defeated. The minutes of the committee show that the article in the partnership deed respecting the attendance of five had been habitually disregarded, and must therefore be considered as not being acted upon and waived. [The *Chief Judge*. That might be a good argument if the committee had constituted the whole partnership. If all the parties who had power to change the terms of the partnership

contract acted in a manner contrary to them, those terms might be considered as having been varied; but the committee had no power to vary the stipulations of the deed.] The petitioners cannot be heard to impeach a resolution of the directors on the ground of an insufficient attendance at the meeting, when they were themselves among those who neglected to attend. A party cannot take advantage of his own default. Another fatal objection to the petition is, that it does not state that the petitioners are shareholders, for if they are not, they have no right to present such a petition.

1847.  
  
 Ex parte  
 Morrison  
 and others.

The *Chief Judge* adverted to the provisions of the 12th and 13th sections of 7 & 8 Vict. c. 111(a).

Mr. *W. Morris* for Mr. *Black*. As the petitioners do not aver that they are shareholders, they have no locus standi. That they are directed under the terms of the act to prepare the accounts and the balance sheet, can make no difference, for these are merely ministerial acts; and it might as well be said that the secretary could petition to annul the fiat.

Mr. *Swanston* for another director submitted the question to the decision of the Court.

Mr. *Metcalf* appeared for another director who had been served, but wished to take no part in the discussion.

THE CHIEF JUDGE.—It would be the utmost injustice to hold that it is not competent to the petitioners to present this petition, exposed as they are to the liabilities

(a) See *ante*, p. 382, n. (a).

1847.

Ex parte  
MORRISON  
and others.

created by these acts of parliament. The next question is, (assuming all other things in favor of these respondents,) whether the declaration filed in the office of the Secretary of Bankrupts, which is the foundation of the fiat, was filed "by virtue of a resolution duly passed in that behalf at a board of directors of such company, or body duly summoned for that purpose." If it was not, the fiat must fail, whether exposed or not exposed to any other objections. Now it has been said that the act makes that which has taken place conclusive evidence that the declaration was filed by virtue of such a resolution. I am not of that opinion. The 4th section makes certain things receivable as evidence *primâ facie* of the requisites which it mentions, but it does not make them conclusive evidence. It does not take away from any interested party the power of contesting it, or the opportunity of showing by other evidence that such a state of things did not exist. The remaining question is whether that is here shown. Now by an instrument not produced, but the absence of which is, I conceive, sufficiently accounted for, and the contents of which are, in my judgment, sufficiently proved, a number of persons considerably exceeding five are appointed to be a general committee of management for conducting the undertaking; and various powers are given to that committee, and various acts which they are to do are mentioned, and with the exception of the authority given by the clause which I am about to mention, I do not understand that the instrument gives power to any one or more of that number to bind the rest or to act without the rest. There is, however, this clause,— "And it is hereby declared, that the majority of the members shall have power to bind all who are absent as

well as those present, as well as the general body of the subscribers." Now when the act was done, the validity of which is now in question, there were certainly more than five members of the committee who not only were capable of being summoned, but were actually summoned. In point of fact, however, only three of them did attend, and the three did the act, or professed and attempted to do the act, in question; and as they were unanimous, it has been contended that inasmuch as five might, if present together, have effectually done the act by means of the majority of three, notwithstanding the dissent of the two, and that number of three was here present doing the act unanimously,—that is sufficient. The unanimous act, however, of the three alone is importantly different from the act of the three (being a majority out of five) who act in the presence of the other two, delivering or capable of delivering their reasons, and of arguing the point with them. It appears to me, therefore, that it is no answer to say, that if five were present three might have done the act. The five were not present. I am of opinion that if any sufficient reason could have been given, none has been given, for a meeting of the three only. I think that for any purpose material at present, in the circumstances, at least, which existed, (for it is not necessary to consider any other probable state of circumstances,) a meeting consisting of less than five members could not do this or any such act. I am of opinion, therefore, that it is proved that the declaration in writing, which is the foundation of the present fiat, was not filed by virtue of a resolution duly passed in that behalf at a board of directors; and that consequently the fiat fails, in my judgment. The petitioning creditor must pay the costs of the petitioners.

Fiat annulled, with costs.

1847.

Ex parte  
MORRISON  
and others.

1847.



Ex parte JAMES PULLIN HINTON.—In the matter of DANIEL WADE ACRAMAN, WILLIAM EDWARD ACRAMAN, and ALFRED JOHN ACRAMAN.

July 6.

Three partners, of a firm of six, carried on a distinct trade in partnership, and indorsed a promissory note made by the six, which was discounted by a person who believed, at the time, from general reputation, that the three were partners in the aggregate firm, but that the firms were distinct.

*Held*, not a case for double proof; and *semble*, that according to the principle of *ex parte Moul*t, the same decision would have been given, independently of the discounter's belief as to the composition of the firms.

IN September, 1841, the petitioner discounted a note, of which the following is a copy:

" Bristol, 14th September, 1841.

" £1650 : 0 : 0.

" At six months after date, we promise to pay to *William Edward Acraman*, Esq., or order the sum of 1650*l.* for value received.

Bristol Iron Works.

PP. *Acramans, Morgan & Co., George Morgan.*"

The note was indorsed in the following manner:

" *W. Edward Acraman.*

" *D. E. & A. Acraman.*

" *Wm. Williams.*"

At the time of drawing the promissory note, the firm of *Acramans, Morgan and Company*, consisted of *Daniel Wade Acraman, William Edward Acraman, Alfred John Acraman, Thomas Holroyd, William Morgan*, and *James Norraway Franklyn*; and the firm of *D. E. & A. Acramans* consisted of *Daniel Wade Acraman, William Edward Acraman*, and *Alfred John Acraman*. The trade of the firm of *Acraman, Morgan & Co.*, was that of ship builders, boiler makers, and engineers; and the trade of the firm of *D. E. and A. Acramans* was that of merchants; and the firms were



so described in two different fiats in bankruptcy, which were issued against the firms respectively. The firms were distinct; each had joint stock funds to a large amount; and independent to a great extent of business transactions. They carried on their business distinctly and separate from each other, and at separate and distinct places.

At the time when the petitioner discounted the promissory note, it was generally believed, and the petitioner knew or believed, from general reputation, that *Daniel Wade Acraman*, *William Edward Acraman*, and *Alfred John Acraman*, who were the partners in the firm of *D. E. and A. Acraman*, by whom the note was indorsed, were also partners in the firm of *Acramans, Morgan & Co.*, but that the firms were distinct and separate firms, he believed, which had no other connexion with each other, except in so far as the one firm might have dealings and transactions with the other.

The petitioner proved his debt under the fiat issued against the firm of *Acramans, Morgan & Co.*, and a dividend of *2s. 6d.* in the pound had been paid him upon or in respect of the proof.

Previously to the receipt of such dividend of *2s. 6d.* in the pound, but after the proof had been made, the petitioner tendered a proof upon the same promissory note under the fiat against *D. E. and A. Acramans*, but the Commissioner refused to allow the proof, on the ground that the petitioner had made his election, by proving under the fiat against *Acramans, Morgan & Co.*, and that at the time the petitioner advanced his money and discounted the promissory note, he knew, or had been informed, that *Daniel Wade Acraman*, *William Edward*

1847.

Ex parte  
HINTON.

1847.  
 Ex parte  
 HINTON.

*Acraman*, and *Alfred John Acraman*, were partners in the firm of *Acramans, Morgan & Co.*

The prayer of the petition was, that the petitioner might be permitted to prove his debt under the fiat issued against *Daniel Wade Acraman*. *William Edward Acraman*, and *Alfred John Acraman*, and that all costs of and attendant upon the petition, might be ordered to be paid out of the estate of the last named bankrupts.

*Mr. Russell* in support of the petition. The Commissioner, in rejecting the proof, has proceeded on the authority of *Ex parte Moul*t (a); but that case differed materially from the present, because the claim there was to prove against the joint estate of the firm and the separate estate of one partner, whereas the present petition does not seek to prove against any separate estate, but only against the joint estates of two distinct firms, against which different fiats have issued, and which were altogether separate concerns. It is well established, that in such a case the creditor is not precluded in bankruptcy from the right to avail himself of both the contracts into which the firms have entered with him, or, in other words, to make a double proof. In *Ex parte Bonbonus* (b) Lord *Eldon* said, "There have been many cases, particularly in the bankruptcy of *Burton, Forbes* and *Gregory*, where three or more partners being also concerned in other trades, the paper of one firm was given to the creditors of another, and they were permitted to take dividends from both estates." The principle on which all the cases prior to *Ex parte Moul*t proceeded, is thus expressed in *Cooke's Bankrupt*

(a) *Mont. & Bli.* 28; 2 D. & C. 419.

(b) 8 Ves. 540.

Law (a):—"When the same persons are concerned in several firms, and issue bills, on which the names of the respective firms stand as drawers, indorsers or acceptors, a party taking such a bill, conceiving them to be distinct houses of trade, may prove against each estate"—a proposition which is fully supported by Lord *Eldon's* decision in *Ex parte Walker* (b); and the present case comes completely within the scope of the doctrine, for it is not necessary that the individual partners should be different, or be conceived to be all different persons, but merely that the houses of trade are, or are believed to be, distinct. All the authorities are fully collected and discussed in the arguments in *Ex parte Moulton*, where it is to be regretted that, in a matter so fully argued, and in which there was an equal division of opinion in the Court from which the appeal proceeded, so short a judgment was given. Nor has the decision been considered satisfactory. In Messrs. Montagu and Ayrton's Treatise (c) it is thus spoken of:—"In this case the judges of the Court of Review were divided in opinion; Mr. *Erskine* and Sir *George Rose* being against the double proof, and Sir *A. Pell* and Sir *J. Cross* in favor of it. Upon appeal to the Chancellor, he concurred with *Erskine*, C.J. and *Rose J.*, but no reason is assigned for the judgment. That this was contrary to the law previous to this case, see *Ex parte Laforest*, Cooke, 251; *Ex parte Benson*, Cooke, 263; *Ex parte Liddell*, 2 Rose, 34; *Ex parte Adam*, 1 Ves. jun.; Bea. 493, S.C.; 2 Rose, 37; *Ex parte Biggs*, 2 Rose, 37; *Ex parte Walker*, 1 Rose, 441." [The Chief Judge. I confess that my impression of the authorities accords with this note. Independently of the

1847.

Ex parte  
HINTON.

(a) Page 251.

(b) 1 Rose, 441.

(c) Page 162, note (g).

1847.

Ex parte  
HINTON.

case of *Ex parte Moul*, I should not feel much difficulty.] Without acceding to the decision in *Ex parte Moul*, it is sufficient to say, that the reasoning on which the argument of the successful party, and the judgments in their favour in the Court of Review proceeded, and which, it may be assumed, were those which influenced the decision upon the appeal, completely distinguish that case from the present. For the whole of that reasoning is, in substance, founded on the circumstance of the distinct firm there having consisted of a single trader.

Mr. *Swanston* and Mr. *Roxburgh* for the respondents were not called upon.

The CHIEF JUDGE.—If knowledge on the part of the petitioner, that the three who composed the firm of three were members of the firm composed of six, is to be considered as material, upon which I do not give any opinion, that point is, I suppose, against the petitioner. Assuming that point to be not against him, I must then recollect that in the case *Ex parte Moul* it is plain that *Geddes* carried on a separate trade under the firm of *Geddes & Co.*, that the separate liability, there in question, was a liability on the part of *Geddes*, as a trader carrying on a business separately under the firm of *Geddes & Co.*, and that his separate contract was consequently a commercial contract, if I may so express myself. I do not, therefore, see any distinction between the case *Ex parte Moul* and the present, unless it is a distinction that *Geddes & Co.* had not a partner, whereas here the minor firm comprises several persons: I think that it is not.

My opinion (subject to the question of knowledge or

ignorance) is, that if by law there ought not to have been double proof in the case *Ex parte Moulton*, there ought not by law to be double proof in the case before me. Had *Geddes* not been a separate trader (and, perhaps, if his contract had not been a trade contract) I should have thought that case not decisive, as I do not consider *Ex parte Husband* (a) decisive of the present.

Without saying what I should have thought it right to do in this case, had *Ex parte Moulton* been out of the way, I consider that I ought not to decide in the petitioner's favor, that case standing.

Petition dismissed, assignees' costs out of estate.

(a) 2 G. & J. 4.



Ex parte JAMES HALL.—In the matter of  
FRANCIS CAREY.

THIS was the petition of a creditor who had proved a debt under the fiat, which was by mistake omitted in the list of proofs, seeking to have his dividend paid by the official assignee.

On the 4th day of April, 1842, the respondent, *Alexander Brymer Belcher*, was appointed official assignee, and *Robert Borrass* and *Robert Clark* creditors' assignees, and Messrs. *Watson* and *Broughton* were appointed solicitors under the fiat.

Debts were proved against the estate to the amount

1847.

Ex parte  
HINTON.

July 15 and 21,  
1847.

Feb. 1, 1848.

Where by mistake one of the debts proved was omitted in the dividend list, and the fund was distributed: Held, that the official assignee and the solicitor to the fiat were personally liable to pay the creditor the amount which he would have received, had his debt been inserted in the list.

1847.  
Ex parte  
HALL.

of 310*l.* 9*s.* 10*d.*; amongst those debts was one of the petitioner *James Hall* amounting to 353*l.* 14*s.* 2*d.*

On the 3rd of April, 1846, there was standing to the credit of the estate 140*l.* 10*s.* 2*d.*, which constituted the whole of the assets, except a sum of 31*l.* 7*s.* 4*d.* not yet administered. There was no prospect of any further assets.

Dividend lists of the debts and assets of the estate were prepared in the first instance by Messrs. *Watson* and *Broughton* as solicitors to the estate, and were afterwards signed by Mr. *Belcher* as official assignee, according to the order 12th November, 1842, relating to official assignees.

The debts appeared by the said list to be 2752*l.* 15*s.* 8*d.*, and the assets 140*l.* 10*s.* 2*d.*; but the list did not contain the debt of the petitioner *James Hall*, the same having been omitted therefrom by Messrs. *Watson* and *Broughton*, and that omission was not corrected by Mr. *Belcher*.

On the 3rd April, 1846, an order of dividend was made by the Commissioner, on the filing of the list prepared by the solicitors and signed by the official assignee, and on the assumption of its correctness.

Dividend warrants were prepared and distributed accordingly to the creditors who were mentioned in the dividend list, but in consequence of the omission of the petitioner's debt, no dividend warrant was prepared for him. He applied for a dividend warrant on the amount of his dividend to the official assignee, who having no dividend warrant or money with which to pay the dividend, refused to comply with the application, and thereupon the petitioner, on the 26th day of June,

1847, presented his petition, praying that it might be declared that the official assignee had rendered himself liable to the petitioner for the sum of 18*l.* 10*d.*, being a dividend of 1*s.* 4*d.* in the pound on 353*l.* 14*s.* 2*d.*, the amount of the petitioner's debt; and that he might be ordered to pay the same to the petitioner accordingly, together with the costs of that application, and the costs, charges and expenses which had been incurred by the petitioner in endeavouring to obtain payment of the said dividend.

1847.

Ex parte  
HALL.

In opposition to the petition, the clerk to the official assignee, who was absent from town on account of bad health, deposed that, according to the practice of the Court of Bankruptcy, the solicitor to the estate is furnished by the messenger to the fiat with copies of the proceedings at each meeting which takes place under the fiat, and that at all meetings for the proof of debts it is the duty of the solicitor to make out a list of the creditors who have proved at such meeting and the amount of their debts, which list is filed with, and forms part of, the proceedings, of which a copy is furnished by the messenger to the solicitor, and the expense of the copies is allowed in the solicitor's bill of costs; that the dividend lists are made out by the solicitor from the copies of the proceedings so furnished to him; that no copy of the proceedings is furnished to the official assignee; and that he has not any means of examining the dividend lists handed to him by the solicitor, except by referring to the original proceedings filed in the Court of Bankruptcy, or to private memoranda; that the solicitor to the estate, and not the official assignee, is paid for preparing the dividend lists, such payment being 1*s.* 6*d.* each for the first hundred cre-

1847.

Ex parte  
HALL.

ditors, and 1s. each afterwards; that the amount of debts stated to have been proved in the account mentioned in the petition to have been delivered by the official assignee to the Commissioner in April, 1846, was taken in the usual manner from the dividend lists furnished to him by Messrs. *Watson, Broughton & Co.* the solicitors to the estate of the bankrupt; that although it is the practice to date the dividend account on the day of the dividend meeting, yet the account is not, in fact, made out and handed to the Commissioner for signature until the dividend lists are furnished by the solicitor; that all due diligence was used in checking the lists; and that the omission was not discovered until the official assignee was applied to after the dividend warrants had been issued; that when the matter was brought before the Commissioner, one of the solicitors stated that he had purposely omitted the debt in the list of creditors under a mistaken idea that the contraction "exhd.," inserted in the margin of the proof of the debt to denote that a document had been exhibited under the fiat, meant that the proof had been expunged; that the order of payment of a dividend was made upon a recital of the amount of debts mentioned in the list furnished to the official assignee by the solicitors, not including the debt of the petitioner; that the only sum the official assignee had in hand was the sum of 3*l.* 7*s.* 4*d.*, recently received from a creditor who held security and had thereout paid himself in full.

The managing clerk of the solicitors deposed that he had attended at the Court of Bankruptcy, Basinghall Street, to make out a dividend list from the original proceedings filed there, and the proofs under the said bankruptcy (which were very numerous); and that in



making out such list from the original proceedings, the proof of the petitioner *James Hall* was omitted therefrom in consequence of the note "Expd. 25th April, 1845, *S. M. Fonblanque*," being inserted in the margin of the proof, the clerk believing that the proof had been expunged by the Commissioner acting under the fiat from the proceedings under the same; but that for greater certainty he had showed the original proof to the Registrar attached to the Court of the Commissioner, who agreed in thinking that such proof must have been expunged, and ought not to be inserted in the dividend lists; and that in consequence of such impression of his own, confirmed by that of the Registrar, the proof was omitted in the dividend list.

The case was argued first without the solicitors to the fiat being served, and under an impression that the respondent, the official assignee, waived any objection on that account. It was afterwards served on the solicitors and re-argued.

*Mr. Russell* and *Mr. Tillotson* for the petitioner. It is clear that the duty of making out the dividend list belongs to the official assignee. By the order of Lord *Lyndhurst* of November 12, 1842, No. 24, it is provided, that when a dividend has been or may be declared, the solicitor to the estate shall forthwith make out three lists of the creditors in alphabetical order; and shall state in separate columns, after the name of each creditor, the amount of his debt, and the dividend to which he is entitled; and in two of such lists the securities exhibited at the time of proof; and shall to each name prefix a number, in regular series, together with the date of the order of dividend, according to the form in the schedule

1847.

Ex parte  
HALL.

July 15.

1847.

Ex parte  
HALL.

hereunto annexed (Nos. 10 and 11); and shall sign such several lists, and shall cause one of such lists which specifies such securities to be filed with the proceedings, and the other of such lists which specifies the securities he shall deliver to the official assignee, together with the lists not specifying the securities; and the official assignee shall examine and sign the several lists, if correct; and shall prepare books at the expense of the estate, containing as many blank warrants as may be necessary, according to the form in the schedule hereunto annexed (No. 12) for London, and (No. 13) for the country; and shall number and fill up a warrant for each dividend, and insert in each warrant the name of the creditor to which the number of such warrant is prefixed in the list, and the dividend payable to him; and shall keep the list specifying the securities in his custody; and shall take and send the books containing such warrants, together with the list not specifying the securities, to the Accountant in Bankruptcy, who shall ascertain that the amount of such warrants does not exceed the sum standing in his name to the credit of the bankrupt's estate; and shall compare the warrants with the list, and, if correct, shall certify the same by affixing the seal of his office, to be provided for that purpose, in the margin of the warrants; and he shall keep in his custody the list of creditors, and return the warrants to the official assignee for delivery to the creditors, as hereinafter mentioned. The provision that the official assignee shall sign the lists, if correct, obviously places upon him the responsibility of seeing to their correctness.

The CHIEF JUDGE inquired whether the counsel for

the official assignee required the solicitor to the fiat to be served with the petition.

.1847.

Ex parte  
HALL.

Mr. *Bacon* and Mr. *Willes* for the official assignee said they were willing to leave that point to the decision of the Court, and that their client did not desire the solicitor to be served.

It was afterwards arranged that the petition should stand over, that inquiry might be made as to the practice in the Court of Bankruptcy with respect to the dividend lists.

Mr. Commissioner *Fonblanque*, the Commissioner acting in the prosecution of the fiat, attended to assist the Chief Judge in the hearing of the petition.

July 21.

Mr. *Bacon* and Mr. *Willes* for the official assignee. The 1 & 2 *Will.* 4, c. 56, s. 23, provides that that act shall not extend to authorize any official assignee to interfere with the assignees chosen by the creditors in the appointment or removal of a solicitor or attorney, or in directing the manner of effecting any sale of the bankrupt's estates or effects. Now it is clear from the terms of the portion of the order cited as well as from the reason of the thing, that it is the duty of the solicitor to the fiat to ascertain and state what proofs have been established; and the official assignee cannot be in any way answerable for the conduct of the solicitor, he being appointed and removable by the creditors' assignees only. The provision of the order, that the official assignee is to examine the list, does not mean that he is to compare it with the proceedings, but merely that he is to see that it is

1847.

Ex parte  
HALL.

accurate upon the face of it. At the end of the rule of November 12, 1842, is a collection of forms, and at the head of the form No. 11, "List of Proofs of Debts and Claims for Dividends, No. 1," is this note,—“The dividends will be paid from this list; it is therefore required to be carefully extracted from the proceedings, signed by the solicitor to the fiat, and delivered to the official assignee the same day, or at the furthest the following day.” From this direction it appears that the duty of the official assignee does not commence until the accuracy of the list as extracted from the proceedings is verified by the solicitor's signature. And the reason of such a provision is evident, because it belongs much more to the functions of the legal adviser than of the official assignee to certify what proofs have been legally established and admitted. The 24th article of the Order of November 12, 1842, which is relied on by the petitioners, begins by the words “That when a dividend has been or may be declared,” which show that the official assignee has nothing to do with making the dividend, except to see that the calculation is correct. [The *Chief Judge*. Mr. *Fonblanque* thinks that the words “has been or may be” mean “is proposed to be,” which, I suppose, must be their meaning, otherwise I cannot understand them. The question seems to turn on the meaning of the two words “if correct” in the 24th section of the order.] We submit they can only mean arithmetically “correct.”

Mr. *Russell* in reply.

THE CHIEF JUDGE.—The official assignee having declined to ask that the petition may stand over and be

served on the solicitor to the fiat, I must decide the case on the present materials. The words of the 24th section of the order are, "And the official assignee shall examine and sign the several lists if correct, and shall prepare books at the expense of the estate, containing as many blank warrants as may be necessary, according to the form in the schedule hereunto annexed, No. 12 for London, and No. 13 for the country, and shall number and fill up a warrant for each dividend." My impression is, that under this order it is the duty of the official assignee not to sign the list without ascertaining that it is correct, not alone arithmetically but otherwise substantially. In this impression I am fortified by the concurrence of Mr. *Fonblanque*. Therefore, as the official assignee does not ask that the solicitor may be present to take the whole or a share of the responsibility, I must charge him with the whole, which I do very reluctantly, and I would gladly relieve him if there were any fund out of which I could do so: for the error is one into which any officer might have fallen, and which does not involve any imputation upon him. I trust it will for the future be understood, that, according to the construction which this Court puts upon the order, the official assignee must ascertain for himself that the list is correct. The amount to be paid to the petitioner will of course be that to which he would have been entitled if his debt had been included in the list, and the official assignee must, I fear, pay the costs.

1847.

  
Ex parte  
HALL.

Application was afterwards made on behalf of the official assignee for a special case, but it being proposed to introduce into the case a statement that the official assignee had, by his counsel, waived any objection on the

1847.

Ex parte  
HALL.

ground of the solicitor to the fiat not being served; it was represented that no such waiver had been intended, whereupon the petition was directed to be served upon the solicitor, and to be set down again for argument.

1848.  
February 1.

The case coming on accordingly on this day,

Mr. *Russell* and Mr. *Tillotson* appeared for the petitioner.

Mr. *Swanston* for the solicitor contended that no blame attached to him. The proceedings had been examined by his clerk, and there was a note of the Commissioner in the margin of the proceedings, which appeared to denote that the proof had been expunged, and on this account it was omitted in the list.

Mr. *Bacon* and Mr. *Willes* appeared for the official assignee.

The VICE-CHANCELLOR KNIGHT BRUCE (a) said, that the solicitor could not be excused from knowing whether a proof had been expunged or not. The mistake had arisen from a mere slip, to which any one was liable, but for which the parties whose duty it was to see that the proceedings were accurately conducted must be held responsible. The omission must be considered to have taken place on the part of both the solicitor and the official assignee, and both must be made answerable for it. The order for payment must be made on both.

(a) The Court of Review had been abolished by the 10 & 11 Vict. c. 102. See Appendix, p. v.

Ex parte JOSEPH ROTHERY.—In the matter of  
JOSEPH ROTHERY.

1847.

THIS was the petition of the bankrupt, who had been committed, and was in prison for not answering satisfactorily. He had been twice brought up on his own application to be re-examined, when, his answers still proving unsatisfactory, he was recommitted. He now sought by his petition to be brought up again at the expense of the estate, if there were any funds in hand on account thereof, and if not, that the Commissioner, and all proper officers, might be directed to attend at York Castle to take the petitioner's further examination.

July 28.

When the bankrupt, after being committed, had been twice brought up to be re-examined, and had been recommitted, the Court declined to order him to be brought up again at the expense of the estate.

Mr. *Swanston* in support of the petition. In *Ex parte Graham (a)*, the bankrupt presented a petition similar to the present, which was opposed by the assignees as regarded the payment of the expenses, but the Lord Chancellor said, "It is a commitment till conformity; the form of the commitment is conclusive; the meeting must be at the expense of the estate; the bankrupt has no estate, or is supposed to have none." And in *Ex parte Cohen (b)*, Lord Eldon directed that if there were no effects, the Commissioners should meet *gratis*, receiving their fees out of future effects, if there should be any.

Mr. *Bagshawe* for the assignees. In the case last cited, Lord Eldon said, that the bankrupt would find it very difficult to obtain another order to bring him up; it is such an order that is here sought, the bankrupt having been brought up twice already. The assets amount to 10*l.* and no more, and are not sufficient to pay the solicitor's bill.

1847.

Mr. *Swanston* in reply.

Ex parte  
ROTHERY.

The CHIEF JUDGE.—I cannot interfere in this case. The petition must be dismissed. The assignees may take an order for their costs out of the estate, in case any funds should be hereafter realized.

Petition dismissed, Assignees' costs to come out of the estate.

Ex parte WILLIAM PENNELL.—In the matter of SAMUEL WILLIAM SUSTENANCE.

August 3.

Where a stock legacy bequeathed to the bankrupt had been transferred into the names of the official assignee and the creditors' assignee, and the former survived the latter, and left the country, and became bankrupt: *Held*, that the Court might, on the petition of the new official assignee of the original bankrupt served upon the Bank and the assignees of the former official assignee, direct the funds to be transferred to the Accountant in Bankruptcy, and that a petition under Sir Edward Sugden's Act was unnecessary.

THE bankrupt was, at the date of the fiat, entitled, under a will, to a 1-8th share of 1600*l.* consols, and also to a 1-8th share of 878*l.* 15*s.* 4*d.* 3 per cent. reduced annuities.

On the 23rd of October, 1840, the administrator *de bonis non* of the testator transferred, into the names of *Henry Watts* and *Peter Harris Abbott*, the creditors' and official assignees, 200*l.* 3 per cent. consolidated bank annuities, and 91*l.* 15*s.* reduced 3 per cent. annuities, as and for the share of the bankrupt in these sums, after deducting and retaining the legacy duty and a portion of the expenses. These sums of stock were still standing in the names of *Henry Watts* and *Peter Harris Abbott*, with the several dividends which had become due thereon since the date of the transfer.

On the 27th of October, 1843, *Watts* died, leaving *Abbott* surviving. No new creditors' assignee had been chosen, but on the 3rd of April, 1841, the petitioner was appointed official assignee in the room of *Abbott*,



who had then left this country, and had not since returned.

On the 22nd of April, 1841, *Abbott* was adjudicated a bankrupt, and the petitioner was appointed official assignee, and *William Manton* and *Adam Murray* were appointed the creditors' assignees under the fiat against *Abbott*. The petitioner was also appointed official assignee in the room of *Abbott* under all the fiats in which the latter had been appointed assignee.

In order to make a final dividend under the estate of the bankrupt *Sustenance*, the petitioner caused application to be made to the Bank of England to allow the petitioner, as official assignee substituted for *Abbott* under the fiat against *Sustenance*, and also as official assignee of *Abbott*, to transfer such several sums of stock, and the dividends thereon, into the name of the Accountant in Bankruptcy, to the credit of the fiat against *Sustenance*, but the Bank declined to do so without an order from this Court sanctioning such transfer.

The prayer was, that the Governor and Company of the Bank of England might be directed to permit the petitioner, as official assignee of *Sustenance* as well as of *Abbott*, to transfer the 200*l.* 8*l.* per cent. consolidated bank annuities, and the 91*l.* 15*s.* 8*l.* per cent. reduced annuities, respectively standing in the names of *Watts* and *Abbott*, into the name of the Accountant in Bankruptcy, to the account of the estate of the bankrupt *Sustenance*, and might either permit the said petitioner to receive the dividends which had already become due, and any further dividends which, prior to such transfers, might accrue due thereon respectively, or otherwise, that the Governor and Directors of the Bank of England might be directed to transfer such several sums of stock, and carry over such dividends, into the

1847.

Ex parte  
PENNELL.

1847.

Ex parte  
PENWELL.

name of the Accountant in Bankruptcy to the account of the estate of the bankrupt *Sustenance*.

Mr. *Hardy* supported the petition.


Mr. *Simon*, for the creditors' assignees of Mr. *Abbott*, submitted to any order the Court would be pleased to make.

Mr. *Roundell Palmer*, for the Governor and Company of the Bank of England, submitted to the Court whether such an order as was sought could be made under the jurisdiction in bankruptcy, and whether, as the party in whose name the funds were standing was out of the jurisdiction, and a transfer was required from him, or some one authorized to transfer in his place, a petition under Sir Edward Sugden's Act was not necessary.

The CHIEF JUDGE.—The 29th section of the act, 6 Geo. 4, c. 16, provides, "If any bankrupt shall have standing in his name, as trustee, any government stock, funds or annuities, it shall be lawful for the Lord Chancellor, on the petition of the person or persons entitled in possession to the receipt of the rents, issues and profits, dividends, interest or produce thereof, on due notice given to all other persons (if any) interested therein, to order the assignees, and all persons whose act or consent thereto is necessary, to convey, assign or transfer the said estate, interest, stock, funds or annuities to such person or persons as the Lord Chancellor shall think fit." I think that this authorizes the Court to direct a transfer into the name of the Accountant in Bankruptcy without an application being made to the Court of Chancery.

The following was the Order :

This Court doth order, that the Governor and Company of the Bank of England do allow the petitioner, as assignee of *Peter Harris Abbott*, to transfer the sum of 200*l.* 3*l.* per cent. consolidated bank annuities, and the sum of 91*l.* 15*s.* 3*l.* per cent. reduced annuities, respectively standing in the names of *Henry Watts*, deceased, and *Peter Harris Abbott*, in the books of the Governor and Company of the Bank of England, into the name of the Accountant in Bankruptcy, to the account of the estate of the said bankrupt *Samuel William Sustenance*; and it is further ordered, that the said Governor and Company of the Bank of England do allow the said petitioner, as such assignee of the said *Peter Harris Abbott* as aforesaid, to receive the dividends which have already become due, and any further dividend which, prior to the said transfers hereby directed to be made, may accrue due thereon respectively; and it is ordered, that the costs of all parties of and occasioned by this application be paid out of the said sum of 200*l.* 3*l.* per cent. consolidated bank annuities and 91*l.* 15*s.* 3*l.* per cent. reduced annuities, such costs to be taxed by the commissioner of Her Majesty's Court of Bankruptcy, acting in the prosecution of the fiat awarded and issued against the said bankrupt, or by the Master of the Court of Bankruptcy.



1847.

Ex parte  
PENNELL.

1847.

Nov. 3, 1846.

Nov. 13, 1847.

Before Lord  
Cottenham, C.

A testator directed that it should be lawful for his wife to retain in her hands and employ any sums not exceeding 6000*l.*, in carrying on the trades in which he might be engaged at his decease, and he appointed his wife and his son executrix and executor. The widow carried on the testator's trade, taking the son into partnership, and the monies received were placed with the bankers to their joint account. *Held*, on their bankruptcy, that the employment of 6000*l.* of the assets in the trade so carried on, was authorized by the will, and gave no right of proof in competition with the joint creditors, and that the circumstance of the son being taken into partnership made no difference.

**Ex parte BUTTERFIELD.**—In the matter of  
**BUTTERFIELD.**

**THIS** was an appeal from the decision of the Court of Review (reported ante, p. 319) upon a special case, from which the statement in the former report was taken.

Mr. *Swanston* and Mr. *Bacon* for the appellants, the assignees. The Commissioner was right in rejecting the proof, for the employment of the capital in the business was consistent with the will. The testator entrusted the son, in his character of executor, with the administration of the estate, and the circumstance of his being formally admitted a partner with his mother did not render the carrying on of the trade at variance with the trusts of the will. The consequence is, that, according to the principles of *Ex parte Garland* (a), the proof cannot be admitted, being in substance that of a partner against the partnership assets.

Mr. *Russell* and Mr. *Chandless* for the respondents. Under such a trust, the widow had no right to take a partner. The testator directed that the widow should "retain in her hands" his assets to the amount of 6000*l.* in carrying on the trade. How can she be said to have done so, when, by taking a partner, she gave another person the control of the fund? It would be most dangerous to hold that a trustee may take a partner in carrying on the testator's business. The circumstance of the son being a co-executor makes no difference, because the testator has not trusted him with the carrying

(a) 10 Ves. 110.

on of the trade. His having authority to administer as personal representative does not constitute him a trustee of the clear fund, when the administration is complete and the trust legacy realized. It can then only be dealt with by the trustee, whom the testator has appointed for that purpose, and for her to delegate her duties to another was clearly a breach of trust, in respect of which a proof must be admitted without in any degree contravening the authority of *Ex parte Garland* (a), where no such breach of trust had been committed. In *Cleugh v. Bond* (b), your Lordship said: "It will be found to be the result of all the best authorities upon the subject, that although a personal representative acting strictly within the line of his duty, and in using reasonable care and diligence will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive." These observations apply to the present case, for here the property was put within the control of a person who ought not to have been entrusted with it.

1847.  
  
 Ex parte  
 BUTTERFIELD.

Mr. Swanston in reply.

(a) 10 Ves. 110.

(b) 3 Myl. & Cr. 490.

1847.

Ex parte  
BUTTERFIELD.  
Nov. 13.

The LORD CHANCELLOR.—I am of opinion that Mr. Commissioner *Holroyd* was right in rejecting the proof of 6000*l.* part of 8921*l.* 3*s.* 9*d.* It is stated in the special case that this 6000*l.*, part of the testator's estate, had been used by the widow and her son, the bankrupts, both being personal representatives of the testator, in the trade carried on by them in partnership. The testator by his will declared that it should be lawful for his widow to retain in her hands, and to use and employ any sum or sums of money not exceeding 6000*l.* in the whole, in carrying on the trade or business in which he might be engaged at the time of his death, or any part thereof, for and during so long a time as she might think fit. The residue of the estate to be given in part to the widow for life, and after her death amongst the testator's children. Upon the testator's death the widow took possession of his stock in trade, of the value of 3345*l.* 19*s.* 3*d.*, part of the 6000*l.*, and having taken her son and co-executor into partnership with her in the testator's trade, all monies received by them on account of the testator's estate were placed with the bankers to the account of *Mary Butterfield* and Son; the monies received from the trade were paid to the same account, and from that account all sums payable on account of the trade were drawn. The remainder of the 6000*l.* was composed of part of the balance of that account. If the 6000*l.* so employed in trade was improperly so employed, it was a debt from the representative and trader, and as such proveable; but if such employment was authorized by the will, then it formed part of the traders' capital, and as such was applicable to the payment of the creditors.

In *Ex parte Garland* proof had been made for some

sums, the employment of which in the trade was authorized by the will, and of others not authorized, and Lord *Eldon* directed the proof to stand only for such sums of which such employment was not authorized. There were questions in the case not raised in this, but upon the point in question here, Lord *Eldon* says: "It is admitted that they, the creditors, have the whole fund embarked in the trade"—meaning the fund authorized to be so employed, and concludes by expressing an opinion that only the property declared to be embarked in the trade should be answerable to the creditors of the trade.

1847.  
  
 Ex parte  
 BUTTERFIELD.

The 6000*l.* in the present case is in the same position, and is therefore answerable to the creditors, and the proof must be rejected in this case as it was in that. The circumstance that the widow took her son and co-executor into partnership with her, and that part of the 6000*l.* was placed to their joint account, cannot make any difference. That the whole was employed in the trade is part of the special case, and it was what the will authorized. How as between the partners it was disposed of and applied cannot affect the rights or interests of those who could only be entitled to prove if the employment had not been consistent with the directions in the will.

The order of the Court of Review must be discharged, and that of Mr. Commissioner Holroyd restored.

## MEMORANDUM.

The Court of Review was abolished on the 1st of September, 1847, under the provisions of the Act 11 & 12 Vict. c. 102, see ~~post~~ <sup>APPENDIX</sup>, page v. Under this Act the Lord Chancellor made the following

## ORDERS.

" By virtue of an Act passed in the eleventh year of the reign of Her present Majesty, intituled ' An Act to abolish the Court of Review in Bankruptcy, and to make Alterations in the Jurisdiction of the Courts of Bankruptcy and Court for Relief of Insolvent Debtors,' I do hereby appoint, that all the jurisdiction, powers, authorities and privileges of the Court of Review in Bankruptcy by the said Act abolished shall henceforth be exercised and enjoyed by the Right Honorable Sir James Wigram, Knight, one of the Vice-Chancellors of the High Court of Chancery, until further Order shall be made in that behalf.

" Dated this 16th day of September, 1847.

" COTTENHAM, C."

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" By virtue of an Act passed in the eleventh year of the reign of Her present Majesty, intituled ' An Act to abolish the Court of Review in Bankruptcy, and to make Alterations in the Jurisdiction of the Courts of Bankruptcy and Court for Relief of Insolvent Debtors,' I do hereby appoint, that all the jurisdiction, powers, authorities and privileges of the Court of Review in Bankruptcy by the said Act abolished shall henceforth be exercised and enjoyed by the Right Honorable Sir James Lewis Knight Bruce, one of the Vice-Chancellors of the High Court of Chancery, until further Order shall be made in that behalf.

" Dated this 2nd day of November, 1847.

" COTTENHAM, C."



# CASES IN BANKRUPTCY

BEFORE THE

**Lord Chancellor, Vice-Chancellors, &c.**

1847.

November 16.  
*Before the Vice-  
Chancellor  
Knight Bruce.*

Ex parte SPOONER.—In the matter of PAYNE.

**THIS** was the petition of an assignee, appointed by the Insolvent Debtors' Court, of the estate and effects of a retired country Commissioner of Bankrupts, to whom compensation under 5 & 6 Vict. c. 122, s. 58, had been awarded, amounting to 199*l.* per annum.

An order had been made by the Lord Chancellor for the payment of this annual sum by the Accountant-General in Bankruptcy.

In July, 1847, the usual vesting order had been made by the Insolvent Debtors' Court, and in August the petitioner was appointed assignee by that Court. The prayer of the present petition was, that the compensation might be paid to the petitioner, as assignee of the insolvent.

The Vice-Chancellor will not under the jurisdiction in bankruptcy direct the Accountant in Bankruptcy to pay the compensation pension of a retired Commissioner of Bankrupts to his assignee, under the Insolvent Debtors Acts.

Mr. *Bacon* and Mr. *W. R. Ellis*, in support of the petition, submitted, that, as the compensation fund was in the hands of the Accountant-General in Bankruptcy, his Honor had jurisdiction over it; and they referred to

1847.

Ex parte  
SPOONER.

a late case of *Ex parte Corser*, in *re Cox* (a), where a retired country Commissioner had become bankrupt, and the Court of Review had made an order for payment of his retiring pension to his assignee.

Mr. *Wright*, for the insolvent, contended that his Honor had no jurisdiction, this being a case of insolvency, and not of bankruptcy.

THE VICE-CHANCELLOR KNIGHT BRUCE.—The Court of Review had undoubtedly jurisdiction over the Accountant in Bankruptcy for many purposes and in many cases, but the question is, whether that Court would have exercised jurisdiction in such a case and for such a purpose as this. I think not; and as I have only the same

Ex parte  
CORSER,

January 27 and  
March 8, 1847.

Order for payment of retiring pension of Commissioner of Bankrupts to his assignees, in an unopposed case.

(a) Ex parte GEORGE SANDFORD CORSER, EDWARD EDWARDS, and JOSEPH ASHBY.—In the matter of WILLIAM COX.

This was the petition of a late partner and the assignees in bankruptcy of a retired Commissioner of Bankrupts, to whom a pension had been awarded. Before the bankruptcy, a moiety of the pension had been assigned to the partner by a deed of dissolution of partnership.

Mr. *Glass*, in support of the petition, cited *Ellis v. Walmsley*, 11 Law Journ. (N.S.), 150.

The order was, that the Accountant-General in Bankruptcy should be at liberty to make all such payments, or draw all such cheques in favour of the petitioners respectively for payment to them of equal moieties of the annuity of 35*l.*, as the bankrupt could have made, or as the Accountant in Bankruptcy could have made in favour of the bankrupt, if he had not become bankrupt, if the Lord Chancellor should think fit.

The petition was not served on any one, and the validity of the claim of the petitioners as against the bankrupt was not therefore contested. In a subsequent case in Chancery, however, in which the bankrupt in the principal case was defendant, and opposed the claim of his assignees, his Honor intimated an opinion adverse to such claim; see *Spooner v. Payne*, 2 De Gex & Smale.

authority as the late Court of Review had, I cannot accede to the prayer of this petition.

1847.

Ex parte  
SPOONER.

Mr. *Wright* asked for costs, but the Vice-Chancellor declined making any order.

Ex parte BELL.—In the matter of ALFRED TUNSTALL and JOHN WALKER CASH.

THE petitioner was the public officer of the National Provincial Bank of England, and the bankrupts were oil merchants at Bristol, who had an account with the bank, which was overdrawn.

On June 2nd, 1847, they obtained a further advance of 737*l.* 10*s.* 10*d.*, agreeing to give the bank a lien on twenty tons of oil on its way to one Mr. *Johnson*, a warehouse keeper at Hull; and they accordingly signed the following memorandum:

“ Bristol, 3rd 6th mo. 1847.

“ To the Directors of the National Provincial Bank of England.

“ In consideration of advances made on our account, we have this day directed the transfer by *R. H. Johnson* of twenty tons of olive oil, or thereabouts, into the name of *H. E. Stephens*, your manager here; which oil we hereby authorize you to sell and dispose of when and as you shall see fit, and to place the produce to our credit.

“ *Tunstall & Cash.*”

At the same time they delivered to the manager of the bank the following memorandum:

November 10.  
Oil merchants give a lien on oil belonging to them in the hands of other persons to a creditor, who, trusting to an incorrect representation of the oil merchants, delays taking possession or giving notice of lien, and the merchants repossess themselves of the oil, mix it with their general stock, and become bankrupt.

Held, that the lien was good, and that the oil was not in the order and disposition of the bankrupts with the consent of the true owner.

1847.

Ex parte  
BELL.

" Bristol, 3rd 6th month, 1847.

" *R. H. Johnson*, Clare Street, Hull.

" Please transfer to *H. E. Stephens* the olive oil, (above twenty tons), which we have this day arranged for storing in thy cellar.

" *Tunstall & Cash.*"

This order was duly delivered by the manager to Mr. Johnson, (into whose hands, however, the oil never came), and the advance was thereupon made by the bank.

On Saturday, the 5th of June, the bankrupts applied for still further accommodation, and received from the banking company two drafts on London, amounting together to 816*l.* 16*s.*, but only upon the terms of their giving another order upon the oil, directed to the keeper of the warehouses of the Birmingham and Bristol Railway, where the oil had then arrived.

This order was given by the bankrupt *Tunstall*, who dated it the 4th of the 7th month instead of the 6th month.

On the mistake being discovered on Saturday evening, the order was brought back to him to be altered, when he wrote another correctly dated, but said, at the same time, that it would not be required, as the oil would be delivered to Mr. *Johnson* early on Monday morning, on the account of the bank.

On the Monday morning the director of the branch bank at Bristol received a letter from the bankrupts saying that they had examined the oil, and found its condition so bad, that it would be unsafe to move it.

This being considered unsatisfactory, the company's agent caused the order to be presented to the warehouse-keeper of the railway at three o'clock in the afternoon of Monday, and was informed that, at six o'clock on that

morning, sixteen tons of the oil had been delivered out by the order of the bankrupts to the superintendant of their manufactory. This order was dated June 3rd, and was delivered on the 7th to the superintendant, who removed the sixteen tons that day, and the remaining four tons on the following day to the bankrupts' warehouse, where it was mixed with the other oil belonging to them.

The fiat issued on June 11th.

The prayer of the petition was for a declaration that the lien was valid,—for a valuing order, and leave to prove for the difference.

Mr. *Bacon* and Mr. *J. T. Humphreys* supported the petition.

Mr. *Russell* and Mr. *Osborne* for the assignees. The first order, that directed to Mr. *Johnson*, was a mere nullity, as the oil was never in his possession. The whole case, therefore, depends on the order directed to the railway company. That, however, could give no complete title till it was delivered, and before it was delivered the oil had returned to the bankrupts, and formed with other oil one mass, from which it was undistinguishable at the time of the bankruptcy. No case can be produced in which it has been held that there was a valid and complete transfer of personal property under such circumstances.

THE VICE-CHANCELLOR KNIGHT BRUCE.—I decline saying whether there was a transfer of the property, but I am satisfied that there was a valid and available contract of lien before the bankruptcy, which is perfectly good against the assignees, subject only to the question whether the bankrupts, at the time of their

1847.

Ex parte  
BELL.

1847.

Ex parte  
BELL.

bankruptcy, had, by the consent and permission of the true owner, in their possession, order, and disposition, this property, and were the reputed owners, or had taken upon themselves the sale, alteration, or disposition thereof. I am of opinion that, upon the facts of this case, they had not the goods in their possession at their bankruptcy with the consent of the true owner, and, therefore, I think the lien must be allowed.



Nov. 17 &amp; 24.

*Semble*, that the  
1 & 2 Vict.  
c. 110, s. 8, is  
not repealed by  
5 & 6 Vict.  
c. 122.

Ex parte GOODALL.—In the matter of GOODALL.

THIS was the petition of the bankrupt to have the fiat annulled for want of an act of bankruptcy, or sufficient petitioning creditor's debt; the act of bankruptcy relied upon being the omission to comply with the requirements of the 1 & 2 Vict. c. 110, s. 8.

Mr. *Russell* and Mr. *Glasse* for the petitioner, contended that the enactment in question was inconsistent with, and was therefore repealed by the 5 & 6 Vict. c. 122, and that neither Ex parte *Cheese* (a), nor *Regina v. Dunn* (b), had decided the point otherwise.

Mr. *Swanston* appeared for the respondents.

THE VICE-CHANCELLOR KNIGHT BRUCE.—What inconsistency is there in the legislature providing two different modes of proceeding to obtain the same remedy? I cannot annul the fiat on this ground without the opinion of a court of law.

Terms for bringing an action were settled, but the case has not come on again.

(a) 3 M. D. & D. 79.

(b) 11 Jurist, 908.

1847.

Ex parte ROBERT POOLE.—In the matter of  
THOMAS SYMES.

November 24.

BY indentures of lease and release and settlement, dated the 2nd and 3rd of July, 1813, the latter made between *Thomas Symes* (the late father of the bankrupt) of the first part, the bankrupt of the second part, *Charlotte Symes*, his wife, then *Charlotte Poole*, of the third part, and the petitioner *Thomas Poole* and *Thomas Evered Poole* of the fourth part (being the settlement made previously to, and in contemplation of, the bankrupt's marriage to his late wife), certain hereditaments were assured, subject (as to part) to a life estate in the bankrupt's father, to the use and behoof of the bankrupt and his assigns for his life, with remainder to the use of the petitioner *Robert Poole* and *Thomas Evered Poole* and their heirs during the life of the bankrupt, upon trust to preserve the contingent remainders, with remainder to the uses for the benefit of *Charlotte Symes* during her life, with remainder to the use of the children of the marriage equally, as tenants in common in tail, subject to powers of appointment among them. In the release was the following covenant: "And the said *Thomas Symes* the younger doth hereby for himself, his heirs, executors, and administrators, separately covenant, promise and agree to and with the said *Robert Poole* and *Thomas Evered Poole*, their heirs, executors and administrators, that he the said *Thomas Symes* the younger, his heirs, executors, and administrators, shall and

By an antenuptial settlement the intended husband covenanted to purchase a convenient residence for himself and his intended wife, the purchase to be made with her approbation; and if it could not conveniently be made within twelve months after the marriage, he covenanted to invest 1000*l.*, at least, in the purchase of freeholds or leaseholds, or in the funds, in the names of the trustees, till a residence could be found. Five years after the marriage the husband purchased a freehold messuage for 1600*l.*, but never conveyed it to the trustees, nor treated it as subject to the settlement. Several years afterwards he raised 1800*l.* by way of mortgage upon this messuage and other property devised to him by his father; and

while some of the money thus raised remained unmixed with his general estate, became bankrupt: *Held*, that the money ought to be apportioned between the devised and purchased property comprised in the mortgage, and the proportion attributable to the latter, paid to the trustees of the settlement; and that they had a charge upon the equity of redemption of the purchased estate for the amount (if any) by which the proportion fell short of 1000*l.*

1847.

  
Ex parte  
POOLE.

will, as soon after the said intended marriage shall take effect as an opportunity shall offer, purchase, either in fee or for some long or beneficial term or terms of years, a convenient and suitable messuage or dwellinghouse, with requisite offices thereto, for the residence of the said *Thomas Symes* the younger, and his said intended wife therein, not exceeding in value the sum of 1000*l.*, such purchase to be with the consent and approbation of the said *Charlotte Poole*, but not otherwise; and in case such purchase cannot be conveniently made within the space of twelve months from the day whereon the said intended marriage shall take effect, that then he or they shall and will immediately thereupon, either with or without such consent and approbation as last aforesaid, lay out, expend and invest the sum of 1000*l.* at least in the purchase of some freehold or fee simple or long leasehold lands and hereditaments in the said county of Somerset, or lay out, place or invest the said sum of 1000*l.* in the public stocks or funds, or in some other government securities, or on good and sufficient mortgage or private security in the names of the said trustees, to be ready to be laid out in making such purchase as aforesaid; and the said sum of 1000*l.*, when so laid out or invested, shall be and remain to and upon the several uses and trusts hereinbefore mentioned, till such messuage or dwellinghouse and offices or lands can be obtained; and such messuage or dwellinghouse or lands and hereditaments when so purchased shall be immediately conveyed to the said trustees and their heirs, executors, administrators or assigns, to and for the same several uses, upon the same several trusts, and for the same several ends, intents and purposes, as are hereinbefore declared of and concerning the several closes,



lands and hereditaments hereinbefore mentioned, and hereby granted and released, except that the same purchased messuage, lands or hereditaments shall be and be considered as limited to the said *Charlotte Poole* only during the time of her continuing the widow of the said *Thomas Symes* the younger, and after ceasing to be such widow, then to the issue of the said marriage in manner aforesaid, and in case of failure of such issue to the said *Thomas Symes* the younger, his heirs and assigns for ever; and the dividends and interest arising or accruing on the said sum of 1000*l.* so invested as aforesaid, till laid out in such purchase as aforesaid, shall be paid to the person or persons for the time being entitled to the rents and profits of the settled estates under these presents."

1847.  
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Ex parte  
Poole.

The marriage was solemnized on the 29th of September, 1813.

No purchase of any messuage or dwellinghouse was made by the bankrupt within twelve months from the day of the marriage, nor did the bankrupt immediately upon the expiration of the twelve months mentioned in the settlement, as therein covenanted, invest 1000*l.* In July, 1818, however, he purchased for 1600*l.* a messuage and lands at Bridgewater, which consisted of freehold and fee-simple lands and hereditaments.

His wife, *Charlotte Symes*, in her lifetime made no application to the trustees respecting the purchase of a suitable and convenient residence for the bankrupt and herself; nor did she ever signify that she was ready to give or had given her consent and approbation to any purchase of such convenient residence or dwellinghouse.

*Charlotte Symes* died in March, 1835. In September, 1846, the bankrupt raised 1800*l.* by a mortgage of the messuage and lands purchased by him at Bridgewater,

1847.  
Ex parte  
Pooler.

and also of a messuage and lands at Stowey, which he took under the will of his father; and, accordingly, on the 15th of January, 1847, these lands were conveyed to the mortgagee, for the purpose of securing the repayment of the sum of 1000*l.* and interest.

On the 29th of March, 1847, the fiat issued, and there was at that time a considerable part of the 1800*l.*, advanced by the mortgagee, in the hands of a Mr. *Henry Parsons*, the bankrupt's solicitor. It had since been got in by the assignees.

This was the petition of one of the trustees of the settlement, stating to the above effect, and praying that it might be declared, that the trustees of the settlement had at the time of the mortgage of January, 1847, a lien upon the freehold hereditaments at Bridgewater, purchased by him as therein mentioned for the sum of 1000*l.*, covenanted to be paid by him in the release of the 3rd of July, 1813, and also a lien upon the mortgage monies, and upon the life interest of the bankrupt in the freehold estates under the settlement for the said sum of 1000*l.*; and the petition prayed that the sum of 1000*l.* might be ordered to be paid to the trustees out of such part of the sum of 1800*l.* as might then be in the hands of the assignees; and that if the 1000*l.* should not be thus raised, the life interest of the bankrupt in the freehold estates comprised in the settlement might be sold, subject to the just claims of the mortgagee; and if all these funds were insufficient, the petition sought leave to prove for the deficiency.

Mr. *Russell* and Mr. *Batten*, in support of the petition, cited *Wellesley v. Wellesley (a)*, *Garthshore v.*

(a) 4 Myl. & Cr. 561.

*Chalie (a), Ex parte Mitford (b), Woodyat v. Gresley (c), Deacon v. Smith (d), Priddy v. Rose (e), and Ex parte Turpin (f).*

1847.  
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Ex parte  
POOLE.

The VICE-CHANCELLOR.—Here the trustees have no dominion over the income. The bankrupt has a legal estate for life.

Mr. *Bacon* and Mr. *Freeling* for the assignees. There is no evidence to shew that the property was purchased as a performance of the covenant. The money laid out was 1600*l.*, not 1000*l.*; and the trustees, who knew of the purchase, which was made as long ago as 1816, never required any portion of the estate to be settled.

Mr. *Bagshawe*, for the other trustee, disclaimed all interest.

The VICE-CHANCELLOR.—The assignees are respondents here, and I think the equity not so doubtful as to require a bill to be filed. According to the established principles of the Court, it is the right of those interested under the settlement, represented here by the petitioner, to treat the estate in question as purchased, *pro tanto*, with the view of performing the covenant; at least as against the bankrupt, and those claiming under him, otherwise than as purchasers for valuable consideration without notice. I think, therefore, that the mortgage money in the hands of the assignees must be apportioned between the purchased estate and the

(a) 10 Ves. 1.

(b) 1 B. C. C. 398.

(c) 8 Sim. 180.

(d) 3 Atk. 323.

(e) 3 Mer. 86.

(f) Mont. 443.

1847.

Ex parte  
Pooler.

devised estate, both of which, I understand, are comprised in the mortgage; and so much of this money as shall on this principle belong to the purchased estate must be appropriated to the performance of the covenant. For the residue of the 1000*l.* (if any) the petitioner will have a lien on the equity of redemption of the purchased estate.

The counsel for the assignees admitted that the proportion of the sum in their hands, attributable to the purchased estate, exceeded 1000*l.*; whereupon an order was made for payment by them of that amount to the trustees, in satisfaction of the covenant.

Ex parte JOSEPH STEPHENSON.—In the matter of JOHN STEPHENSON.

Dec. 12 and 14.

A landlord distrained upon goods of his tenant, and sold part of them, which were subject to a mortgage.

The tenant became bankrupt: *Held*, that the mortgagees was entitled to stand in the place of the landlord, and to be paid the amount of his mortgage debt out of the proceeds of the goods taken under the distress, which were not comprised in his security.

BY an indenture dated the 30th of July, 1844, and made between the bankrupt of the one part, and the petitioner of the other part, the bankrupt assigned unto the petitioner, his executors, administrators and assigns, all the household furniture, stock in trade, shop fittings and other fixtures of him the said bankrupt then being in or about his house and shop, subject to redemption on payment of 500*l.* with interest. The deed was executed on the day of its date, and on the same day formal possession of the household furniture, stock in trade, shop fittings, fixtures, and other saleable effects thereby assigned, was given by the bankrupt to the petitioner.

On the 11th of August, 1847, the landlord distrained,

and, by his bailiff, took possession of the household furniture, stock in trade, and other effects then being thereon, for the sum of 25*l.*, being half a year's rent. On the same day, after the bailiff had entered, he was authorized by the petitioner to hold possession of the household furniture, stock in trade, shop fittings, and fixtures (subject to the claim of the landlord), on behalf of the petitioner, by virtue of the deed of assignment, which was on the same day delivered to him, as an evidence of such authority.

The bailiff continued to hold possession of the effects as well under the distress for rent as by virtue of the authority received from the petitioner, until the 16th of August, 1847, when he sold a sufficient portion of the furniture to pay the rent and the expenses of the distress. The petitioner then authorized a Mr. *Henry Burton* to receive from the bailiff possession of the residue of the furniture, stock in trade, shop fittings and fixtures on behalf of the petitioner; and the deed of assignment was then delivered to *Henry Burton* as his authority for that purpose.

On the 14th of August, 1847, the petitioner was served with a notice that the bankrupt had committed an act of bankruptcy, and that a fiat would be forthwith issued against him, and requiring the petitioner not to sell or dispose of the furniture and effects.

Until the receipt of this notice, the petitioner had no notice that the bankrupt had committed an act of bankruptcy, or had become, or was about to become, a bankrupt.

On the 16th and 17th of August, the petitioner removed the remaining furniture, fixtures and fittings to a warehouse of his own.

1847.

  
Ex parte  
STEPHENSON.

1847.

Ex parte  
STEPHENSON.

Shortly afterwards the fiat issued, and on the 24th of August the messenger seized the furniture, fittings, and fixtures thus removed. Part of it was the stock in trade belonging to the bankrupt at the date of the assignment, and was assigned thereby, but the residue consisted of stock purchased by him in the ordinary course of trade, in lieu of stock sold by him subsequently to the execution of the assignment.

The petitioner had applied to the Commissioner to direct a sale under Lord *Rosslyn's* Orders, but the Commissioner considered that he had no jurisdiction to make such an order.

The petition prayed for a declaration that the petitioner was a legal mortgagee of the unsold household furniture, stock in trade, shop fittings and other fixtures lately in or about the messuage or tenement, shop and premises lately in the occupation of the bankrupt, taken possession of by the messenger, and for the usual consequential relief.

Mr. *Swanston* and Mr. *Metcalf*, in support of the petition, referred to *Jarman v. Woolloton* (a), and *Ex parte Styan* (b), as to the petitioner's title. They also contended that, as part of the property comprised in the petitioner's security had been taken by the landlord, the petitioner was, upon the principle of marshalling, entitled to stand in the landlord's place with respect to the other goods taken under the distress, to the extent to which the mortgaged property had been taken. They referred to *Aldrich v. Cooper* (c), and *Greenwood v. Churchill* (d).

(a) 3 T. R. 618.

(b) 2 M. D. &amp; D. 219.

(c) 8 Ves. 382.

(d) 1 Myl. &amp; K. 546.

Mr. *Russell* and Mr. *Malins*, for the assignees, contended that the principle of marshalling had never been applied, and was not applicable to such a state of things.

1847.

Ex parte  
STEPHENSON.

The VICE-CHANCELLOR reserved his judgment.


The VICE-CHANCELLOR.—The question upon which, December 14.  
having had some doubt, I reserved my opinion in this case, is one of marshalling. Certain personal chattels of the bankrupt were specifically charged by him for valuable consideration, by way of mortgage, in favour of a creditor; but the bankrupt being permitted to have the possession of these goods, and also being the possessor of other personal chattels to which the creditor's security did not extend, the bankrupt's landlord distrained for rent, not upon the former only, but upon both sets of goods; and the person in possession under this distress for the landlord was requested by the mortgagee, and consented, to hold possession of the goods, or, at least, of the mortgaged goods, for him, as well as for the landlord, without prejudice, of course, to the landlord's rights. All this was before the bankruptcy. A sale under the distress, and under the distress only, took place after the bankruptcy, by means of which the landlord's demand was satisfied. The goods thus sold, however, were not all the goods the subject of the distress, but included or consisted of some, if not all, of those which were subjected to the mortgagee's security, while some or all of the goods to which his security did not extend have remained unsold; and the disputed point is upon the mortgagee's claim to apply against the assignees the doctrine of marshalling: he asserting and they denying, that, as between him and

1847.

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Ex parte  
STEPHENSON.

them, such of the goods seized as were not included in his security were the portion of them first applicable to pay the landlord's demand, and that, consequently, the mortgagee is entitled, against the assignees, to be placed substantially in the same situation as if the landlord had regulated his proceedings in conformity with that title. I have considered the point, and my doubt has been removed. The doctrine and rules recognised by Lord *Eldon* in *Aldrich v. Cooper* seem to me to reach this case, which, if new in specie, is not so, I think, generally. Fraud and reputed ownership being out of the question, the assignees and the bankrupt are here one, so that no fourth person's right intervene, and the ordinary course, where the first creditor has two funds of a debtor, whose second creditor has but one, seems the right course on this occasion. The simple case of a person having lent or entrusted goods to a man, whose landlord distrains for rent, both on those goods and also on the proper goods of the tenant, may be thought to exhibit, possibly, more strikingly than the present, a necessity in point of reason and justice for judicial interference, but does not, I suppose, in substance differ from it. The mortgagee being, I think, right in this contention, I must direct the principle of marshalling to be applied between him and the assignees accordingly.





1847.

Ex parte THOMAS OLDAKER.—In the matter of  
THOMAS OLDAKER.

December 20.

THIS was the petition of the bankrupt to be discharged from custody, under the following circumstances. A creditor of the petitioner, named *Sills John Gibbons*, made an affidavit of debt in the Court of Bankruptcy, on the 18th of September, 1847, whereby he deposed, that the petitioner was justly and truly indebted to him, and to his co-partners in trade, in 173*l.* 10*s.*, for goods sold and delivered, and that the petitioner was a trader within the meaning of the bankrupt laws. The petitioner then entered into a bond, with two sureties, according to 1 & 2 *Vict.* cap. 110, s. 8, in the penal sum of 348*l.*, conditioned to be void on payment by the petitioner, his executors or administrators, to Messrs. *Gibbons* and *Crookes*, their executors, administrators or assigns, of such sum or sums of money as should be received against the petitioner, with damages and costs; or on the petitioner surrendering himself to the custody of the gaoler of the Court, in which the said action or any other was brought for recovery of the said debt, according to the practice of such Court or Courts, or within such time and in such manner as the said Court or Courts, or any judge thereof respectively, should direct after judgment should have been recovered in such action or actions.

A trader debtor being summoned, entered into a bond with sureties, conditioned for payment of the debt, or the surrender of the debtor in execution. The creditors recovered judgment, and a fiat was issued, at the instance of another creditor, against the debtor, who obtained his protection under it, and then surrendered in discharge of his sureties in the bond: *Held*, that the protection did not entitle him to be released from the custody to which he had voluntarily surrendered himself.

On the 18th of September, 1847, Messrs. *Gibbons* and *Crookes* commenced an action in debt against the petitioner for the sum of 173*l.* 10*s.* and interest; and judgment was signed on the 30th of November, 1847, for 203*l.* 13*s.*

1847.

  
Ex parte  
OLDAKER.

On the 3rd of December, 1847, the fiat was issued upon the petition of another creditor, named *Francis Woodhouse*, under which the petitioner was duly found and adjudicated a bankrupt.

On the 6th of December, the petitioner surrendered to the fiat, and gave his consent, testified in writing, under his hand before the Court of Bankruptcy, to the adjudication. He then obtained the following certificate or protection from arrest under the hand of the Commissioner—

6th day of December, 1847.

Before Mr. COMMISSIONER SHEPHERD.—Be it remembered, that the within named *Thomas Oldaker* came and surrendered to me, a Commissioner of her Majesty's Court of Bankruptcy, under a fiat issued against him, and submitted to be examined from time to time before me, touching a discovery and disclosure of his estate and effects; but not being now prepared to make a full discovery and disclosure of his estate and effects, prayed further time for that purpose, which I have granted accordingly until the 21st day of December at this place at two o'clock in the afternoon.

H. J. SHEPHERD.

No writ of *capias* had been issued in the action, but on the same 6th of December the petitioner surrendered himself in discharge of the bond of the 7th of October, 1847, and of his sureties, according to the practice of the Court of Queen's Bench, and was thereupon committed by Mr. Justice *Patteson* to the custody of the keeper of the Queen's Prison.

At the time of the surrender the petitioner was not in custody, and there were no detainers lodged against

him. The petitioner then applied to Messrs. *Gibbons* and *Crookes*, the plaintiffs in the action, to discharge him by reason of his having obtained his protection, but they refused to do so.

1847.

  
Ex parte  
OLDAKER.

On December 8th a summons was taken out to show cause why the petitioner should not be discharged out of custody, and Mr. Justice *Patteson* on the 10th dismissed the summons, stating as his reason, that the bankrupt not having been arrested, but having rendered himself in discharge of his sureties, was not within the acts respecting protection from arrest.

Mr. *Russell* and Mr. *Glasse* in support of the petition. In *Ex parte Leigh* (a) the bankrupt was out on bail, and yet the Lord Chancellor discharged him, saying that looking at the fifth section of the statute of *Geo. II. c. 301*, he thought that the bankrupt was exempt from arrest for the 42 days after his actual surrender, and consequently that he was entitled to be discharged if it were shewn in any manner he had actually surrendered on a day proved, and that he had been arrested within the 42 days. With reference to the argument that the bankrupt is not entitled to his discharge, inasmuch as he was not arrested but surrendered himself, it must be remembered that he was bound under the condition of the bond to render himself, and that such a render cannot therefore be considered voluntary. It will probably be urged that the bankrupt did not render himself until he had obtained his protection, but the plaintiffs cannot be heard to say this, for after the 30th November they might have arrested the petitioner.

(a) 1 Gl. & J. 264.

1847.  
  
 Ex parte  
 OLDAKER.

Sureties under 1 & 2 *Vict.* c. 110, s. 8, are in the same position as bail in an action. *Owston v. Coates* (a), *Hinton v. Acraman* (b). In *Geikie v. Hewson* (c), Mr. Justice *Coltman* says, "It was evidently the intention of the legislature, that the sureties in the bond described in that act should be entitled to discharge themselves upon rendering their principal; and the object of the present application is to obtain relief under the equitable jurisdiction of the Court. If we were to refuse to grant the application, the effect would be that the principals must be rendered, whereby the sureties would be discharged. But that would be a great hardship upon the bankrupts, as they would have a right to be immediately discharged out of custody."

Mr. *Speed* for the respondents, Messrs. *Gibbons* and *Crook*. The cases in which the Court has interfered have been cases in which the arrest has been a contempt. In *Ex parte Hawkins* (d) the arrest had taken place on the bankrupt returning from his examination, and it was held that subsequent detainers could not be supported. He also referred to *Ex parte King* (e), *Ex parte Donlevy* (f), *Ogles' case* (g), *Ex parte Leigh* (h). This Court will not hear an appeal from the judgment of Mr. Justice *Patteson*, but will leave the petitioner to apply to the Court of Queen's Bench in banco. Another objection is, that the case is excepted from the operation of the 5 & 6 *Vict.* c. 122, by these words of the 23rd section, "Provided he be not in custody at the time of such surrender." All that the

(a) 10 Ad. & El. 193.

(c) 4 Man. & Gr. 618.

(e) 7 Ves. 312.

(g) 11 Ves. 556.

(b) 2 C. B. 367, 404.

(d) 4 Ves. 691.

(f) 7 Ves. 317.

(h) 1 Gl. & J. 264.

23rd section enacts is, that the bankrupt shall be free from arrest or imprisonment "by any creditor." In the present case he does not seek to be free from arrest or imprisonment by any creditor, for the creditors have been entirely passive. The sureties cannot be regarded as creditors. *Ex parte Gibbons (a)*, *Ex parte Goldie (b)*.

1847.  
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Ex parte  
OLDAKER.

Similar words in former enactments to those of the 23rd section have been held not to apply to arrests by the sheriff or the marshal. *Anderson v. Hampton (c)*, *Ex parte Johnson (d)*. If the surrender of the bankrupt, in discharge of his sureties, is an imprisonment by the creditor, the creditor will have lost, without any fault on his part, his right to go in and prove under the fiat. *Ex parte Knowell (e)*. Surely the right of a creditor to elect cannot be affected by the voluntary act of the bankrupt; and this shows the absurdity of the argument, that the voluntary surrender of the bankrupt is an arrest or imprisonment.

The VICE-CHANCELLOR.—In this case, when the fiat issued, when the bankrupt regularly surrendered, as he did, under it, and when, upon that surrender, he regularly received the ordinary protection from the commencement, covering a time not yet expired, he was not in custody; in any other custody, at least, than the virtual custody (if any) of the persons who, under the provisions of a statute mentioned in the petition (being one of the statutes on which the argument turned), had, before the fiat, become his sureties. He was not actually in custody; his person was not under any restraint.

December 20.

(a) 1 Atk. 238.

(b) 2 Rose, 343.

(c) 1 B. & Ald. 308.

(d) 14 Ves. 36.

(e) 13 Ves. 192.

1847.

  
Ex parte  
OLDAKER.

The imprisonment from which he asks to be discharged had its commencement after the protection granted, but was of his own seeking. He yielded himself to prison in execution, under a judgment against him, obtained before the fiat, in an action upon the demand to which the suretyship related. He did so of his own motion and accord. There was neither arrest nor intervention, in the matter, of any other person, plaintiff or surety, so far as appears; though, probably, the object was to discharge or relieve the sureties; and I suppose that they are, and will remain, discharged, if the bankrupt is wrong in his present contention; though whether, also, if he is right in it, I may be less clear, but give no opinion.

Having thus spontaneously placed himself in a state of imprisonment, he applied to Mr. Justice *Patteson* to be discharged from it. That learned judge heard, considered, and refused the application, holding that the other statutory provision upon which the bankrupt relied, did not apply to such a case. The same application, except of course as to the difference of jurisdictions, has been made to me. I have considered it, and, had I been able to form a clear opinion upon the question, it would have been my duty, probably, to act upon it, even though at variance with that formed by Mr. Justice *Patteson*, the great weight of whose authority every lawyer acknowledges. But I have not been able to form a clear opinion upon the question; I think it one of doubt and difficulty, whether considered with or without reference to the decision of the learned judge. It is, however, not impossible that, in the absence of the precedent, I might have been induced to decide the matter in favour of personal freedom, and, therefore, in favour of the

bankrupt's discharge. But I cannot, upon a merely legal question, which, involved in the obscurity of two acts of Parliament, strikes my mind as very doubtful, interfere, with satisfaction to myself, or, I think, with propriety, against such an authority, directly upon the point, as that before me.

I must, therefore, leave the petitioner to the ordinary legal remedies open to every prisoner who considers himself illegally detained in custody, and dismiss this petition without costs and without prejudice to any application to any other Court or Judge.

1847.

Ex parte  
OLDAKER.

Ex parte JOHN GRIFFITHS and WILLIAM BLOW COLLIS.—In the matter of ALEXANDER MAC NAUGHTAN PATERSON, JOHN WALKER, JAMES BOYDELL and CHARLES BLANEY TREVOR ROPER.

1848.

April 26.

THIS was an appeal from the decision of the Commissioner, declining to admit a proof upon a post obit bond, except with a rebate.

By the bond, which was dated the 15th of October, 1845, *Charles B. T. Roper*, one of the bankrupts, became bound unto the petitioners in the penal sum of 20,000*l.*, subject to a condition making it void, if the heirs, executors, administrators or assigns of the bankrupt, *Charles B. T. Roper*, should, at or before the expiration of twelve calendar months next after his de-

Where by the condition of a post obit bond, given by way of ante-nuptial settlement, interest was made payable during the life of the obligor, and by non-payment thereof the condition had been broken before the obligor's bankruptcy: *Held*, that the obligees were entitled to prove

for the principal sum secured by the bond as an immediate debt.

1848.

Ex parte  
GRIFFITHS  
and another.

cease, well and truly pay, or cause to be paid, unto the petitioners, or the survivor of them, his executors, or administrators, or their or his assigns, or other the person or persons entitled to receive the same, under or by virtue of an indenture bearing date the 31st of July, 1845, the full sum of 10,000*l.*; and if the bankrupt, *Charles B. T. Roper*, his heirs, executors or administrators should, in the meantime, well and truly pay, or cause to be paid, unto *John Griffith* and *Wm. Blow Collis*, and the survivor of them, and the executors or administrators of such survivor, and their or his assigns, and other the person or persons aforesaid, interest on the said sum of 10,000*l.*, after the rate of 3*l.* per cent. per annum, by equal half-yearly payments on the days therein mentioned.

By the indenture of the 31st of July, 1845, referred to in the bond, it was declared that the petitioners should stand possessed of the several sums of money to be paid to them for principal and interest upon the bond, upon certain trusts thereby declared.

The bankrupt, *Charles B. T. Roper*, had never made to the petitioners, or any person interested under the indenture, any payment, either in respect of the principal or interest on the bond.

The petitioners applied to the Commissioner to prove against the separate estate of the bankrupt, *Charles B. T. Roper*, for 10,000*l.* and interest; but the Commissioner refused to permit such proof, except to the extent of the interest due and the value of 10,000*l.*, as a future debt, payable upon the decease of the bankrupt, *Charles B. T. Roper*.

The prayer was, that the petitioners might be permitted to prove against the separate estate of *Charles B.*



*T. Roper*, for the principal sum of 10,000*l.* and interest.

1848.

Ex parte  
GRIFFITHS  
and another.

Mr. *J. V. Prior*, in support of the petition, cited *Ex parte Winchester* (a), and *Ex parte Rowlatt* (b).

Mr. *Wright*, for the assignees. When the cases cited were determined, such a contract as the present could not be the subject of proof as a contingent debt, and, therefore, the Court was obliged to proceed upon the mere technical distinction between cases, in which the condition had, and those in which it had not, been forfeited at law,—a distinction which both Lord *Hardwicke* and Lord *Eldon* regretted to adopt as the foundation of their decisions. They had, however, no alternative between giving effect to the strict legal right and rejecting the proof. The law is now altered, and the reason for the distinction no longer exists (c).

The VICE-CHANCELLOR held, that the authority of *Ex parte Winchester* applied to the case.

The Order was, that the petitioners should be at liberty to make such amount of proof as they could establish against the separate estate of the bankrupt *Roper* in respect of the bond.

(a) 1 Atk. 116. The order in that case (as appearing in the secretary's book) was, that the petitioner should be at liberty to prove his debt of 1000*l.* in the petition mentioned, and be admitted a creditor under the commission for what he should so prove.

(b) 2 Ro. 416. See *Wyllie v. Wilkes*, Doug. 519.

(c) 6 Geo. 4, c. 16, s. 56. See *Ex parte Tindall*, Mont. 462, 1 D. & C. 291.

1848.

Ex parte WILLIAM REID, WILLIAM WIGRAM, EDWARD WIGRAM, and OCTAVIUS WIGRAM.—In the matter of WILLIAM JOHN BUCKLAND.

May 3.

The owner of a public house agreed to grant a lease of it, at a premium. The intended lessee deposited the agreement with *M. & Co.*, brewers, to secure repayment of an advance. The lease was executed, and was deposited by the lessee with the landlord's solicitor, to secure the premium. The lessee obtained it from them for the purpose, as he alleged, of producing it to the magistrates, to enable him to procure a licence. He undertook to return it forthwith; but instead of doing so, he instructed an auctioneer to obtain an advance upon it from other brewers, *R. & Co.*

THIS was the petition of Messrs. *Reid & Co.*, brewers, for the usual order in the case of an equitable mortgage. The petitioners claimed to be mortgagees of two leasehold public houses held by the bankrupt near Greenwich, one called the North Pole, the other the British Queen. The dispute was as to the latter, the circumstances connected with which, as they appeared upon the affidavits, were as follows:—

By an indenture dated the 14th of September, 1846, and made between *William Tyler* of the one part, and the bankrupt of the other part, *William Tyler* agreed to let to the bankrupt the public house called the British Queen, together with the several fixtures thereon, to hold the same unto the said bankrupt, his executors, administrators and assigns from the 25th of March, 1846, for the term of 31 years, at the rent of a peppercorn for the first half year of the term, and at the yearly rent of 15*4*l. 11*s.* for the remainder of the term, payable quarterly, and the bankrupt agreed to take the same, and (amongst other things) agreed that within three

The auctioneer produced to *R. & Co.*'s agent an order from the lessee for the delivery of the lease to *R. & Co.*, noticing that the advance was for the purpose of enabling the lessee to pay *M. & Co.* The agent objected to recognise this memorandum, and inquired whether the lessee owed anything to *M. & Co.* He was informed by the auctioneer and by the lessee that there was nothing due to *M. & Co.*, except for goods supplied. He had previously obtained from the lessee himself an order for the delivery of the lease, not mentioning *M. & Co.* at all; and he obtained the lease on delivering that order. *R. & Co.* advanced money on the deposit. On the lessee becoming bankrupt: Held that the security of *R. & Co.* must be postponed to those of the landlord, and of *M. & Co.*, although there had been subsequently a demise of the property by the bankrupt to a trustee upon trusts, which would extend to the debt of *R. & Co.*, and not to that of *M. & Co.*, or that of the landlord; the above circumstances being held sufficient to affect *R. & Co.*, with notice of the prior equities.

calendar months after a licence should be obtained for carrying on the trade of a victualler, alehouse keeper or tavern keeper on the premises thereby agreed to be demised, he, his executors, administrators, or assigns, would pay to *William Tyler*, his heirs and assigns 500*l.* in consequence of such licence having been obtained; and that if such licence should not be obtained within the first year of the term thereby agreed on, then, but not otherwise, *William Tyler* agreed to allow the bankrupt 85*l.* out of the first year's rent; and it was further agreed that the lease should be granted as soon as a licence should have been obtained for carrying on the said trade or business of a victualler, alehouse keeper or tavern keeper on the premises, and the 500*l.* should have been paid by the bankrupt to *William Tyler*.

1848.  
Ex parte  
REID  
and others.

On the 19th of October, 1846, the bankrupt deposited the agreement with Messrs. *Meux & Co.* the brewers, by way of security.

On the 16th of August, 1847, Mr. *Tyler* granted to the bankrupt a lease of the British Queen, and also of other hereditaments not comprised in the agreement, in the Woolwich Road, for 75 years from Lady-day 1846, at the yearly rent of 160*l.*

When the lease was executed the bankrupt entered into a bond to Mr. *Tyler* for securing the payment of the 500*l.* mentioned in the agreement, and at the same time he deposited with the landlord the lease, for better securing the payment of that sum.

Shortly afterwards the bankrupt called on Mr. *Tyler's* solicitors, requesting that they would lend him the lease to produce before the magistrates, who wished to see it before they determined whether they would grant

1848.

Ex parte  
Reid  
and others.

him a licence of the British Queen. To oblige him the solicitors let him have the lease on his positive assurance that he would return it to them, and at the same time he gave them an undertaking to do so.

On the 18th of October, 1847, the bankrupt took the lease to Mr. *John Walker*, an auctioneer and appraiser, with instructions to negotiate with Messrs. *Reid & Co.* for a loan on the security of that lease, and also for its deposit with them for that purpose. Mr. *Walker* accordingly applied to Messrs. *Reid & Co.* for the sum of 73*l.* 11*s.* to be paid to himself, of which *Buckland* was to receive 50*l.*, and for 200*l.* to enable *Buckland* to pay Messrs. *Meux & Co.* a debt he owed them, and 100*l.* to finish four cottages which had been built on part of the vacant ground demised by the lease, and such further sums as should thereafter be required to finish the houses remaining to be built thereon. On the 2nd of November, 1847, Mr. *Walker* met the bankrupt by appointment at the Dolphin public-house in Coleman Street, when Mr. *Walker* drew up and the bankrupt signed, a letter or order in the following words:—"Mr. *Walker*, I hereby authorise you to hand over to Messrs. *Reid & Co.*, brewers, Liquorpond Street, the lease of my house and premises the sign of the British Queen, Woolwich Road, on payment to you of the sum of 73*l.* 11*s.*, and upon the understanding that I, Mr. *William Buckland*, shall have advanced to me the sum of 200*l.* more to liquidate my engagements with Messrs. *Meux & Co.*, and the further sum of 100*l.* to finish the four cottages already built, with any other sum that I, Mr. *William Buckland*, may require to build the other four cottages, stipulated to be built in said lease; the amount thereof required for the building of the said other four

houses to be advanced as the work progresses to the satisfaction of Messrs. *Reid & Co's* surveyor. This deposit of the lease of the British Queen also applies as a further security for monies advanced upon the lease of the North Pole, Greenwich Road. November 2nd, 1847, *W. J. Buckland*. Witness *Samuel Rogers*."

1848.  
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Ex parte  
Reid  
and others.

Mr. *Huggins*, Messrs. *Reid & Co's* agent, deposed that, prior to *Reid & Co's* making the advance, the deponent particularly and pointedly asked bankrupt whether he owed *Meux & Co.* anything, and that the bankrupt told him in answer, that he only owed them a book debt of about 200*l.*, or between 200*l.* and 300*l.*, and that *Walker*, the auctioneer, told the deponent that bankrupt had told him that he only owed *Meux & Co.* a book debt of about 200*l.* The deponent said that it is not the custom among the porter brewers of London and its immediate vicinity to hold the deeds of public houses as security for a book debt only. He said, that the letter of the 2nd of November was shewn to him, and that he informed Mr. *Walker* that he did not acknowledge the conditions set forth in that letter, as he held in his hand another letter, which was also dated the 2nd November, and was as follows :—

"Mr. *J. Walker*,—Sir,—I request you to deliver to Messrs. *Reid & Co.* the lease of my premises in Greenwich, to be held by them for a security, as the lease of the "North Pole" is now held with them.—Yours, &c.

"*W. J. Buckland*."

The witness further said that Mr. *Walker* remarked on the inconsistency of the two letters or orders, but that the witness then and there informed him that he knew nothing of the letter which Mr. *Walker* produced; that the letter which the witness held in his hand was

1848.

Ex parte  
Reid  
and others.

the bankrupt's authority to *Walker* to deposit the lease with *Reid & Co.*, and that as a proof of the conditions on which the deponent would receive the deed, the deponent gave an acknowledgment for same on the second letter of the 2nd November, and not upon the other; that the deponent suggested to *Walker* that he should keep the second letter, as that was his authority for parting with the lease, and as on that letter was an acknowledgment in deponent's handwriting that he had received the lease: that in order to have further evidence of the terms of the deposit, the deponent wrote a paper marked H, which contained a copy of the paper F, and at the foot thereof *Walker* signed his name to the following memorandum:—"The above is a copy of the memorandum handed to me on giving the lease to Mr. *Huggins*."

Mr. *Taylor*, clerk of Messrs. *Meux & Co.*, deposed to the existence of a custom, that if one brewer's firm has made a loan on the security of the lease of a public house, and another firm sends in beer to the same public house, the firm so sending in beer is expected, upon application for the purpose, to pay off the debt due to the firm holding the lease as a security; and the deponent stated, that having entirely attended to the business of the "British Queen," he was enabled to say that Messrs. *Reid* never applied to *Meux & Co.* to pay off any debt due to them from the bankrupt, which they claim to have secured by the lease of the "British Queen." He also deposed to there being fixed to the house a board denoting that Messrs. *Meux* supplied the house with porter.

In support of the petition it was deposed that when the lease of the "British Queen" was deposited with the petitioners, the petitioners had no notice or knowledge that there was any agreement for the lease, or that any

agreement for the lease had been deposited with Messrs. *Meux* & Co., or that Messrs. *Meux* & Co. had any.

By a deed of November 6, 1847, made between the bankrupt of the one part, and one *James Beales* of the other part, the bankrupt demised both the "North Pole" and the "British Queen" to Mr. *Beales*, upon trust, to secure all such sums as might be due from time to time from the bankrupt, his executors, administrators, or assigns, to any person, upon any equitable mortgage, by deposit of the title deeds of the property thereby demised, or any part of it.

1848.  
Ex parte  
Raid  
and others.

Mr. *Swanston* and Mr. *Jackson* in support of the petition. The petitioners, as incumbrancers without notice, and having possession of the lease, and also having a demise of the legal estate to a trustee in their favour, must be preferred to the landlord and Messrs. *Meux*. The lease must be considered as granted independently of the agreement which Messrs. *Meux* hold; for the parcels are not the same, nor is the term; and the lease omits all mention of a premium. If the premium had been mentioned, the petitioners would have enquired respecting it.

Mr. *Russell* appeared for Messrs. *Meux* & Co.; Mr. *K. Parker* and Mr. *Steere* for Mr. *Tyler*.

The VICE-CHANCELLOR.—If the deed of November 6th had been out of the case, I should have been of opinion that the petitioners would be postponed to Mr. *Tyler*. The debt of 500*l.* was incurred for valuable consideration. That being so, its origin and nature are immaterial. It is an admitted fact that the lease was

1848.

Ex parte  
REID  
and others.

deposited with Mr. *Tyler's* solicitor for Mr. *Tyler*. It appears that upon a false pretence—neither Mr. *Tyler* nor his solicitor intending to abandon Mr. *Tyler's* lien, or to enable a fraud to be practised—the lease was handed to the bankrupt, who made a fraudulent use of it. That circumstance did not give to the petitioners priority over Mr. *Tyler* or over Messrs. *Meux*, with whom the agreement had been deposited for valuable consideration, giving them a right, as between them and the bankrupt, to have the lease handed to them, so that they acquired an equitable interest in his title to the lease, and therefore an equitable interest in the lease.

It is said that the lease is a different lease from that for which the agreement contracted to a certain extent, that land is added, the rent increased, and the term lengthened. The contract is not, however, otherwise changed. I cannot, therefore, consider the lease as independent of the agreement.

So far, therefore, as the land and the term included in the agreement, I think that, as against the petitioners, the equitable title of Messrs. *Meux* remains; but I do not understand that Messrs. *Meux* claim priority or equality as regards the additional land or the additional term. I wish only to hear the case argued on behalf of Mr. *Tyler* with respect to the deed of November 6th.

Mr. *Russell*, for Messrs. *Meux*, said that it was not necessary for them to claim priority as regarded the additional land or term, as the principle of marshalling would apply.

Mr. *Swanston* for Messrs. *Reid*. Messrs. *Meux* can have no right of marshalling against Messrs. *Reid*.



Not only is the subject of Messrs. *Meux's* security limited by the terms of it, but they have no equity to extend it. Mr. *Tyler's* claim extends to the whole subject, but you cannot on that account marshal to the prejudice of a third incumbrancer.

1848.  
  
 Ex parte  
 REID  
 and others.

Mr. *K. Parker*, Mr. *Bacon*, and Mr. *Steere* for Mr. *Tyler*, contended that the deed of November 6 was merely voluntary, and, at all events, could not have the effect of postponing Mr. *Tyler*, inasmuch as the conversation which had taken place between Mr. *Walker* and Mr. *Huggins*, affected the petitioners with notice of the memorandum deposited with Messrs. *Meux*, and, therefore, of the landlord's rights.

The VICE-CHANCELLOR.—The deed of the 6th of November, affecting the legal estate, might have created considerable difficulty, and have varied the rights of the parties, but for the circumstances which have been referred to. It is established that the petitioners had, by means of their agent, in sufficient time, notice of the first document of November 2nd, and that document alludes to the engagement with Messrs. *Meux & Co.*—a common and ordinary security for a publican to give to brewers for a debt from him to them. Accordingly, we find that the expression attracted the attention of Mr. *Huggins*, and that he pointedly made inquiries of the bankrupt, from whom he received the assurances which have been mentioned. Now, considering what is the common practice of persons engaged in this business, and the manner in which this expression struck Mr. *Huggins*, and the nature of the engagement entered into, I am of opinion,

1848.

Ex parte  
Reid  
and others.

deposited with Mr. *Tyler's* solicitor for Mr. *Tyler*. It appears that upon a false pretence—neither Mr. *Tyler* nor his solicitor intending to abandon Mr. *Tyler's* lien, or to enable a fraud to be practised—the lease was handed to the bankrupt, who made a fraudulent use of it. That circumstance did not give to the petitioners priority over Mr. *Tyler* or over Messrs. *Meux*, with whom the agreement had been deposited for valuable consideration, giving them a right, as between them and the bankrupt, to have the lease handed to them, so that they acquired an equitable interest in his title to the lease, and therefore an equitable interest in the lease.

It is said that the lease is a different lease from that for which the agreement contracted to a certain extent, that land is added, the rent increased, and the term lengthened. The contract is not, however, otherwise changed. I cannot, therefore, consider the lease as independent of the agreement.

So far, therefore, as the land and the term included in the agreement, I think that, as against the petitioners, the equitable title of Messrs. *Meux* remains; but I do not understand that Messrs. *Meux* claim priority or equality as regards the additional land or the additional term. I wish only to hear the case argued on behalf of Mr. *Tyler* with respect to the deed of November 6th.

Mr. *Russell*, for Messrs. *Meux*, said that it was not necessary for them to claim priority as regarded the additional land or term, as the principle of marshalling would apply.

Mr. *Swanston* for Messrs. *Reid*. Messrs. *Meux* can have no right of marshalling against Messrs. *Reid*.

1848.

N and THOMAS  
JAMES JACKSON  
FERENS.

June 14.

the assignees, seeking to set  
ated by the bankrupt, whereby  
signed to *Samuel Holker Norris*,  
*James Gibbs*, in trust for creditors.

ecuted by the bankrupt on the 8th of  
i. On the 26th of January, 1848, the  
n the bankrupt's own petition, under the  
, c. 96, s. 41. The bankrupts did not open  
or did any creditor of the bankrupts apply to  
e fiat opened until the 12th of February, 1848,  
nch day *Robert Wilson* and *William Richardson*,  
itors of the bankrupts, applied to the Commissioner  
o have the fiat opened; and the Commissioner, upon  
this application, and upon proof of the trading of the  
bankrupts, and of their having filed a declaration of in-  
solvency, and also upon proof that the bankrupts were  
indebted to *Robert Wilson* and *William Richardson* in  
the sum of 103*l.* 1*s.* 1*d.*, adjudged *James Jackson Ferens*  
and *Robinson Ferens* bankrupts. Copies of the ad-  
judication were served on the bankrupts, who sur-  
rendered on the 14th of February, 1848, and consented  
to such adjudication being advertised in the *London*  
*Gazette*.

The trustees of the composition deed, and in exer-  
cise of the powers and authorities contained in it, sold  
the bankrupts' household furniture, stock in trade, goods,  
chattels, and effects, and received the proceeds, amount-  
ing to 270*l.* 4*s.* 10*d.*, which was now in their hands.

Traders exe-  
cuted an assign-  
ment of all their  
effects in trust  
for their credi-  
tors, and after-  
wards sued out  
a fiat against  
themselves, but  
did not apply  
for adjudication.  
Two creditors  
who could have  
sued out a fiat  
against the  
bankrupts, and  
who could  
under it have  
impeached the  
deed, applied for  
and obtained an  
adjudication:  
*Held*, that the  
assignees could  
successfully  
impeach the  
deed.

CASES IN BANKRUPTCY.

the subject of Messrs. Mar's security  
of it, but they have no equity to  
their claim extends to the whole  
that amount marshalled to the  
1848.  
L. J. 100  
and other


Mr. Storer for Mr.  
member of the  
we have the  
to convey-  
or and  
the

1848.

Ex parte  
REID  
and others.

that there was amply sufficient to put the petitioners, or their agent, upon inquiry, that is, as between themselves and Messrs. *Meux*, to cause them to make inquiries of Messrs. *Meux*. If they had made those inquiries, they would not only have learned the fact of the deposit, but the title of the landlord to the 500*l.*, which would have brought them into communication with the landlord.

The Order, as regarded the British Queen public house, was for sale ; and that the monies to arise from the sale should be applied, after payment of the expenses, and the costs of all parties, so far as related to the British Queen, in the first place, in payment of what was due to Mr. *Tyler* ; secondly, in payment of what was due to Messrs. *Meux & Co.* ; and as to the residue, in payment to the petitioners of what should be found due to them, with the usual directions in the event of a surplus, and the usual liberty to prove in the event of a deficiency.



1848.



Ex parte THOMAS JACKSON and THOMAS BAKER.—In the matter of JAMES JACKSON FERENS and ROBINSON FERENS.

June 14.

**THIS** was the petition of the assignees, seeking to set aside a trust deed, executed by the bankrupt, whereby all his property was assigned to *Samuel Holker Norris*, *James Calton*, and *James Gibbs*, in trust for creditors. The deed was executed by the bankrupt on the 8th of November, 1847. On the 26th of January, 1848, the fiat issued on the bankrupt's own petition, under the 7 & 8 Vict., c. 96, s. 41. The bankrupts did not open the fiat, nor did any creditor of the bankrupts apply to have the fiat opened until the 12th of February, 1848, on which day *Robert Wilson* and *William Richardson*, creditors of the bankrupts, applied to the Commissioner to have the fiat opened; and the Commissioner, upon this application, and upon proof of the trading of the bankrupts, and of their having filed a declaration of insolvency, and also upon proof that the bankrupts were indebted to *Robert Wilson* and *William Richardson* in the sum of 103*l.* 1*s.* 1*d.*, adjudged *James Jackson Ferens* and *Robinson Ferens* bankrupts. Copies of the adjudication were served on the bankrupts, who surrendered on the 14th of February, 1848, and consented to such adjudication being advertised in the London Gazette.

Traders executed an assignment of all their effects in trust for their creditors, and afterwards sued out a fiat against themselves, but did not apply for adjudication. Two creditors who could have sued out a fiat against the bankrupts, and who could under it have impeached the deed, applied for and obtained an adjudication: Held, that the assignees could successfully impeach the deed.

The trustees of the composition deed, and in exercise of the powers and authorities contained in it, sold the bankrupts' household furniture, stock in trade, goods, chattels, and effects, and received the proceeds, amounting to 270*l.* 4*s.* 10*d.*, which was now in their hands.

1848.

Ex parte  
REID  
and others.

deposited with Mr. *Tyler's* solicitor for Mr. *Tyler*. It appears that upon a false pretence—neither Mr. *Tyler* nor his solicitor intending to abandon Mr. *Tyler's* lien, or to enable a fraud to be practised—the lease was handed to the bankrupt, who made a fraudulent use of it. That circumstance did not give to the petitioners priority over Mr. *Tyler* or over Messrs. *Meux*, with whom the agreement had been deposited for valuable consideration, giving them a right, as between them and the bankrupt, to have the lease handed to them, so that they acquired an equitable interest in his title to the lease, and therefore an equitable interest in the lease.

It is said that the lease is a different lease from that for which the agreement contracted to a certain extent, that land is added, the rent increased, and the term lengthened. The contract is not, however, otherwise changed. I cannot, therefore, consider the lease as independent of the agreement.

So far, therefore, as the land and the term included in the agreement, I think that, as against the petitioners, the equitable title of Messrs. *Meux* remains; but I do not understand that Messrs. *Meux* claim priority or equality as regards the additional land or the additional term. I wish only to hear the case argued on behalf of Mr. *Tyler* with respect to the deed of November 6th.

Mr. *Russell*, for Messrs. *Meux*, said that it was not necessary for them to claim priority as regarded the additional land or term, as the principle of marshalling would apply.

Mr. *Swanston* for Messrs. *Reid*. Messrs. *Meux* can have no right of marshalling against Messrs. *Reid*.

Not only is the subject of Messrs. *Meux's* security limited by the terms of it, but they have no equity to extend it. Mr. *Tyler's* claim extends to the whole subject, but you cannot on that account marshal to the prejudice of a third incumbrancer.

1848.  
  
 Ex parte  
 REID  
 and others.

Mr. *K. Parker*, Mr. *Bacon*, and Mr. *Steere* for Mr. *Tyler*, contended that the deed of November 6 was merely voluntary, and, at all events, could not have the effect of postponing Mr. *Tyler*, inasmuch as the conversation which had taken place between Mr. *Walker* and Mr. *Higgins*, affected the petitioners with notice of the memorandum deposited with Messrs. *Meux*, and, therefore, of the landlord's rights.


The VICE-CHANCELLOR.—The deed of the 6th of November, affecting the legal estate, might have created considerable difficulty, and have varied the rights of the parties, but for the circumstances which have been referred to. It is established that the petitioners had, by means of their agent, in sufficient time, notice of the first document of November 2nd, and that document alludes to the engagement with Messrs. *Meux & Co.*—a common and ordinary security for a publican to give to brewers for a debt from him to them. Accordingly, we find that the expression attracted the attention of Mr. *Higgins*, and that he pointedly made inquiries of the bankrupt, from whom he received the assurances which have been mentioned. Now, considering what is the common practice of persons engaged in this business, and the manner in which this expression struck Mr. *Higgins*, and the nature of the engagement entered into, I am of opinion,

1848.

Ex parte  
REID  
and others.

that there was amply sufficient to put the petitioners, or their agent, upon inquiry, that is, as between themselves and Messrs. *Meux*, to cause them to make inquiries of Messrs. *Meux*. If they had made those inquiries, they would not only have learned the fact of the deposit, but the title of the landlord to the 500*l.*, which would have brought them into communication with the landlord.

The Order, as regarded the British Queen public house, was for sale ; and that the monies to arise from the sale should be applied, after payment of the expenses, and the costs of all parties, so far as related to the British Queen, in the first place, in payment of what was due to Mr. *Tyler* ; secondly, in payment of what was due to Messrs. *Meux & Co.* ; and as to the residue, in payment to the petitioners of what should be found due to them, with the usual directions in the event of a surplus, and the usual liberty to prove in the event of a deficiency.





1848.



**Ex parte THOMAS JACKSON and THOMAS BAKER.**—In the matter of **JAMES JACKSON FERENS** and **ROBINSON FERENS**.

June 14.

**THIS** was the petition of the assignees, seeking to set aside a trust deed, executed by the bankrupt, whereby all his property was assigned to *Samuel Holker Norris*, *James Calton*, and *James Gibbs*, in trust for creditors. The deed was executed by the bankrupt on the 8th of November, 1847. On the 26th of January, 1848, the fiat issued on the bankrupt's own petition, under the 7 & 8 *Vict.*, c. 96, s. 41. The bankrupts did not open the fiat, nor did any creditor of the bankrupts apply to have the fiat opened until the 12th of February, 1848, on which day *Robert Wilson* and *William Richardson*, creditors of the bankrupts, applied to the Commissioner to have the fiat opened; and the Commissioner, upon this application, and upon proof of the trading of the bankrupts, and of their having filed a declaration of insolvency, and also upon proof that the bankrupts were indebted to *Robert Wilson* and *William Richardson* in the sum of 103*l.* 1*s.* 1*d.*, adjudged *James Jackson Ferens* and *Robinson Ferens* bankrupts. Copies of the adjudication were served on the bankrupts, who surrendered on the 14th of February, 1848, and consented to such adjudication being advertised in the *London Gazette*.

Traders executed an assignment of all their effects in trust for their creditors, and afterwards sued out a fiat against themselves, but did not apply for adjudication. Two creditors who could have sued out a fiat against the bankrupts, and who could under it have impeached the deed, applied for and obtained an adjudication: *Held*, that the assignees could successfully impeach the deed.

The trustees of the composition deed, and in exercise of the powers and authorities contained in it, sold the bankrupts' household furniture, stock in trade, goods, chattels, and effects, and received the proceeds, amounting to 270*l.* 4*s.* 10*d.*, which was now in their hands.

1848.

Ex parte  
JACKSON  
and another.

They had also received 495*l.* 15*s.* 3*d.* on account of the book debts assigned to them.

The petitioners claimed from the trustees the monies thus realised, and also all the books, papers, writings, goods, chattels, and other the estate and effects of the bankrupts, at present in the possession or control of the trustees.

The trustees refused to comply with this request, but submitted the decision of the dispute between themselves and the petitioners to the jurisdiction in bankruptcy.

The prayer was, that this Court would be pleased to decide whether the trustees were entitled to retain the sums of 270*l.* 4*s.* 10*d.*, 495*l.* 15*s.* 3*d.*, and 25*l.* 10*s.* respectively, and other the estate and effects of the bankrupts, or whether the same ought to be paid to the petitioners as assignees.

Mr. *Bacon* and Mr. *Beales* in support of the petition. This case presents the combination of circumstances, which, in your Honor's judgment, in *Ex parte Philpott* (a), was expressly excepted from the scope of that authority, for here there are creditors competent to impeach the deed, if the fiat had been sued out by a creditor; and, therefore, the deed may be impeached under the present fiat, although sued out by the bankrupts themselves. *Ex parte Norton* (b).

Mr. *Russell* and Mr. *Hawkins* for the trustees of the deed. Although the decision in *Ex parte Philpott* was confined to the circumstances of that case, yet your Honor did not say that the principle could not be applied to cases in which there were creditors, who

(a) *Ante*, p. 346.

(b) *Ante*, p. 528.

under a creditor's fiat might have impeached the deed ; but merely withheld your judgment upon that state of circumstances until it should come before the Court. But now that it is necessary to decide it we submit that the principle upon which *Tope v. Hockin (a)* was decided, and upon which your Honor decided *Ex parte Philpott*, is equally applicable to this case, that principle being that a transaction cannot be impeached under a fiat sued out by any person who was a party to it. Whether that person is a creditor or the bankrupt must be immaterial. In *Ex parte Norton* the question only arose remotely and incidentally, and it was not necessary to decide it.

1848.  
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Ex parte  
JACKSON  
and another.

The VICE-CHANCELLOR.—I understand the facts to be these, that the fiat was well issued at the instance of the bankrupts, under the 41 sect. of 7 & 8 *Vict.* c. 96. I understand also that neither of the bankrupts applied to have the fiat opened, but that two creditors under the same 41 section applied for an adjudication ; that the Commissioner acceded to the application, and that the creditors, Messrs. *Wilson* and *Richards*, then proved the existence of all the circumstances which would have been requisite for the purpose of supporting the fiat, if it had been issued upon their petition, and that if the fiat had been issued upon their petition the deed could not have been supported against the assignees. All this being so, I have before me an act of parliament which provides that “all further proceedings under such fiat shall be thenceforth prosecuted, and carried on in like manner, as if such fiat had been issued and adjudicated upon on the petition of a creditor of the bankrupt.” In

(a) 7 B. & C. 101.

1848.

Ex parte  
JACKSON  
and another.

this admitted state of things I may decide consistently with *Ex parte Philpott*, and think that I ought to decide that this money belongs to the estate to be administered under the fiat.

Ex parte WILLIAM F. THOMAS and WILLIAM PROCTER LOFTS.—In the matter of WILLIAM F. THOMAS.

June 26.

On an application to annul the bankrupt's own fiat, to give effect to one to be sued out by a creditor, for the purpose of setting aside trust deeds, there should be an affidavit, shewing that the debt of the proposed petitioning creditor is old enough to overreach the deeds.

THIS was the petition of the bankrupt (who had sued out a fiat against himself under the 7 & 8 Vict. c. 96, s. 41), and also of a creditor, seeking to annul the fiat, on the creditor undertaking to sue out another fiat. The object of the application was to enable the assignees, when appointed, to impeach certain trust deeds.

Mr. *E. F. Smith* in support of the petition cited *Ex parte Louch* (a).

The VICE-CHANCELLOR said that upon the production of an affidavit, shewing that the debts due to the creditors were old enough to overreach the deeds, the order might be made.

An affidavit was made to that effect, and the order made according to the form in *Ex parte Louch*.

(a) *Ante*, p. 463.

1848.

Ex parte JOHN BARFF, WILLIAM EDWARD FORSTER, and HENRY PHILIP HOPE.—In the matter of JAMES COUSEN, LUCY COUSEN and JOHN RICHARDBY COUSEN, Bankrupts.

June 26.

July 17.

THIS was the petition of the assignees for the opinion of the Court upon the following state of circumstances, the respondents submitting to the jurisdiction :

A debt due from a devisee to his testator does not constitute any lien upon the devised estate.

*Jane Richardby*, by her will devised to the bankrupt, *James Cousen*, her trustee, and his heirs, all and sundry lands and heritages, goods and gear, debts and sums of money, and in general the whole means, estate and effects, heritable and movable, real and personal, of what kind and nature soever or wheresoever situated, presently belonging and addebted, or which should belong and be addebted to her at the time of her decease, in trust always for the ends, uses and purposes after specified, viz., in the first place for payment of all her debts, funeral expenses, and the expense of executing the trust. Secondly, she appointed her said trustee and his aforesaid to give to her brother *James Richardby* during his life, in case he survived her, the annual rents of the hereditaments and appurtenances therein before specially conveyed; and failing the said *James Richardby* by pre-deceasing the testatrix or otherwise, then she appointed her said trustee to give to her sister Mrs. *Lucy Cousen*, one of the bankrupts, widow of *Isaac Cousen*, for her life the annual rents of the said hereditaments and appurtenances, from and after the decease of the said *James Richardby*, under deduction of such a sum as should be necessary to keep them in a proper state of repair, with

1848.  
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 Ex parte  
 BARRY  
 and others.

remainders over. The testatrix also appointed her trustee to lay out and invest the sum of 2000*l.* sterling, and to pay the interest to the bankrupt *Lucy Cousen* for her life, and at her death to divide the principal sum in manner therein mentioned; and she declared that the greater proportion of her money was lent to the said *James Cousen*, her nephew and trustee; and that when so lent, was intended to remain in his hands for several years; and she thereby provided and declared, that it should not be imperative on her said trustee immediately to lay out and invest the various sums thereby appointed to be invested by him, but that he should be bound to pay to the said Mrs. *Marianne Rogers*, *Jane Maria Richardby*, and Mrs. *Lucy Cousen*, or in case of their decease, the parties succeeding to them, interest on the said respective sums, at the rate of 4*l.* per cent. per annum, in the same manner as if the same sums were invested.

The testatrix died shortly after making her will, which was proved by the bankrupt, *James Cousen*.

At the time of her death, the bankrupts, *James Cousen*, *Lucy Cousen*, and *John Richardby Cousen*, had in their hands, as copartners in trade, a large sum of money belonging to the personal estate of the testatrix.

*Lucy Cousen* was also separately indebted to the testatrix to the amount of 3000*l.*

Owing to the insufficiency of the assets, the legacies abated, and out of the sum then in the hands of the firm, a sum of 1921*l.* 10*s.* 5*d.* was entered in their books, as due from them to *James Cousen*, in his representative character, and which represented the legacy of 2000*l.*

On the 22nd of February, 1847, an order was made, that one *Joseph Sutcliffe* should be at liberty to go in

under the fiat and make such proof as could be established against the joint estate, or against the separate estate of either of the bankrupts, in respect of the amount alleged to be due from the bankrupts to the testatrix's estate. In obedience to this order, *Joseph Sutcliffe* proved for 236*l.* 8*s.* 4*d.* against the joint estate.

1848.

Ex parte  
BARRF  
and others.

The prayer was, that the rights and interests of the petitioners, as the assignees of the bankrupts, of and in the freehold estates devised by the will, might be ascertained and declared; and that the rights of the petitioners of and in (among others) the legacy of 2000*l.* or in the funds then representing it, subject to the payment of the costs of the application and consequent thereon, might be ascertained and declared.

The question mainly in dispute was, whether there was any lien on behalf of the testatrix's estate upon the interests given by the will to the bankrupt, *Lucy Cousen*, in respect of the debt of 3000*l.*, due from her to the testatrix.

Mr. *Bacon* and Mr. *Elmsley*, for the assignees, contended that no case for a lien was established, as against the interests given to *Lucy Cousen*, or at all events none except as against *Lucy Cousen's* life interest in the legacy of 2000*l.*

Mr. *Swanston* and Mr. *J. V. Prior*, for the respondents. In *Woodyatt v. Gresley (a)*, the life estate of a cestui que trust under a settlement, was held to be

(a) 8 Sim. 180; see also *Jeffs v. Wood*, 2 P. W. 128; *Morris v. Livie*, 1 Y. & C. C. C. 380; *Barnett v. Sheffield*, 1 D. M. & G. 371.

1848.

Ex parte  
BARRY  
and others.

subject to a charge, for the purpose of replacing a sum of stock, which was subject to the settlement, and which had been sold out by the cestui que trust; and in *Mitford v. Mitford (a)*, an annuity to which a bankrupt was entitled under a settlement was held to be subject to a lien for a debt due from him to the trustees of the settlement as such trustees. They also cited *Burridge v. Row (b)*.

The VICE-CHANCELLOR.—If any property, real or personal, belonging to this lady had been expressly given by the will, it is clear that, according to the principle of the doctrine of election, she could not claim under the will without giving effect to the disposition of her own property. It has struck me, as an arguable point, whether there is any substantial distinction in principle between the case which I have put, and one in which a part of the property, given by the will, is in the hands of a donee under it, in the shape of a debt.

I am not aware, however, of any instance in which the doctrine has been carried to that extent, and I do not think that I can venture thus to extend it. By claiming under the devise, Miss *Cousen* does not claim in contradiction of the will. She admits her liability to pay, but from circumstances is unable to do so. It is not, therefore, a claim of right. The property given includes a debt due from her. Is it a tacit condition that the debt shall be paid before she can take under the devise? I cannot venture to assert such a proposition for the first time. If you can find any precedent, I shall probably be disposed to follow it.

(a) 1 Bro. C. C. 398; and see 3 Mer. 105.

(b) 1 Y. & C. C. C. 183, 583.



By the Order it was declared, that the assignees were entitled during the life of the bankrupt, *Lucy Cousen*, to receive the rents and profits of the real estate devised to or in trust for *Lucy Cousen* for her life by the will of *Jane Richardby*; and that the persons interested in the legacy of 2000*l.*, given by the same will, subject to the life interest of *Lucy Cousen* therein, were entitled to have the interest of the Bank Annuities produced by the investment of the dividends declared in respect of the proof made against the joint estate, for the amount due from them in respect of the legacy of 2000*l.*, accumulated during the life of *Lucy Cousen*, or until the same, together with the accumulations thereof, and the amount of the dividends already declared, or thereafter to be declared, in respect of such proof, should be equal to the amount of the principal money due from the bankrupts, in respect of the said legacy; and the Order proceeded to direct payments and carryings over accordingly.

1848.

Ex parte  
BARRY  
and others.

July 17.

1848.

Ex parte THOMAS STOKES and RICHARD GOODMAN.—In the matter of JOHN CLARK, RICHARD MITCHELL, JOSEPH PHILIPS, and THOMAS SMITH.

July 17 & 24.

A bond was entered into by a principal and three sureties. The principal, and one of the sureties, compounded with their creditors, and the other two sureties became bankrupt. The obligee proved the full amount of his debt against the separate estates of the two bankrupts, and claimed under the compositions, and by these means received 20s. in the pound; but the estate of the compounding surety paid more than its contributive share: *Held*, that that estate was entitled to the benefit of the proof made by the obligee against the bankrupt surety.

THIS was the petition of persons claiming under a surety, and seeking to stand in the place of a creditor who had proved against the estate of a co-surety.

In 1829 Mr. *James Pickering Ord* borrowed 5000*l.* of *Thomas Stokes*, one of the petitioners, upon the joint and several bond of himself and three sureties, namely, *Thomas Charles Ord*, *John Clark*, and *Joseph Philips*.

*John Clark* and *Joseph Philips* were two of the above-named bankrupts, and carried on business in partnership with the other two bankrupts, as bankers at Leicester.

On the 31st May, 1843, a joint fiat issued against them, and they were duly found bankrupts.

*Thomas Stokes* proved upon the bond, under the fiat, against the separate estates of *John Clark* and *Joseph Philips*.

In June, 1843, Mr. *James Pickering Ord*, the principal debtor, compounded with his creditors; and in the same month, Mr. *Thomas Charles Ord* executed a deed of assignment of all his property to the petitioners, *Thomas Stokes* and *Richard Goodman*, upon trust for his creditors. The petitioner, *Thomas Stokes*, in his character of obligee in the above-mentioned bond, came in under both these compositions, in each of which there was reserved to every creditor the benefit of all collateral securities.

In February, 1845, the obligee received a dividend of

2s. in the pound from the estate of the principal debtor.

1848.

Ex parte  
STOKES  
and another.

In May, 1845, he received a dividend of 5s. in the pound from the estate of *Thomas Charles Ord*, and in October, 1845, another dividend of the same amount from the same estate.

In January, 1846, he received a dividend of 5s. in the pound from the estate of the bankrupt *Clark*.

In March, 1846, he received a further dividend of 2s. in the pound from the estate of the principal debtor.

In November, 1846, a further dividend of 1s. 6d. in the pound was declared from the same estate, and it was not probable that any further dividend would be obtained from the estate of the principal debtor. Of this dividend the obligee received only 1s. in the pound, which made up 20s. in the pound upon his debt.

The dividends paid from the estate of the principal debtor having discharged only 5s. 6d. in the pound upon the bond debts, and having left 14s. 6d. to be paid by the sureties (being at the rate of 4s. 10d. in the pound from each estate), and the estate of *Thomas Charles Ord* having paid 10s. in the pound, the present petition was presented by the trustees of his estate, for leave to stand in the place of the obligee, as regards the proof against the estate of the bankrupt *Philips*, which had not yet paid any dividend, and to receive dividends, to the extent of 4s. 10d. in the pound, from that estate.

Mr. *Bacon* and Mr. *De Gex* in support of the petition. —The case, although new in circumstances, falls within the principles of established authorities. Before the right of a surety, who had paid after the bankruptcy of the principal debtor, to prove under the fiat, was directly

1848.

Ex parte  
Stokes  
and another.

given by act of parliament, and independently of any statutory right, it was decided upon general principles of equity, that where the creditor had proved against the principal debtor, a surety, who afterwards paid the debt, was entitled to stand in the creditor's place. The general principle on which this was so held was, that a surety paying the debt was entitled to all the securities held by the creditor as against the debtor. *Ex parte Atkinson* (a) *Beardmore v. Cruttenden* (b), *Ex parte Rushforth* (c), *Ex parte Brook* (d), *Ex parte Holmes* (e). It follows from the same principle, that a surety who has overpaid his contributive share has a right to avail himself of the creditor's securities, as against a co-surety, and that a proof against the estate of the co-surety is to be treated as a security within the rule.

Mr. Russell for the assignees.—In *Wallis v. Swinburn* (f), it was held that there is a wide difference in a bankruptcy between the claim of a surety against his principal, and his claim against a co-surety. In *Ex parte Rushforth* (g) it was laid down that a surety only paying part of the debt had no equity to stand in the place of the creditor. It would be most unjust as regards the other creditors of the surety, that a co-surety, who is no creditor at all, should, by paying a portion of the debt, have the benefit of a proof for the whole.

Mr. Bacon, in reply.—*Wallis v. Swinburn* only decided

(a) Cook's Bankrupt Law, 264.

(b) *Ibid.* 265.

(c) 10 Vesey, 409.

(d) 2 Ro. 334.

(e) Mont. & Ch. 301.

(f) 1 Exch. 203.

(g) 10 Ves. 414; and see *Paley v. Field*, 12 Ves. 435.

that the case of a co-surety is not within the 6 *Geo.* 4, c. 16, s. 8, and does not affect the equitable principle on which we rely, independently of any statute.

1848.

Ex parte  
Stokes  
and another.

The VICE-CHANCELLOR.—This case, during the argument, did not appear to me free from difficulty, nor do I now think it clear. I have, however, come to a conclusion upon it.

In the first place, assuming the correctness of the principle or rule recognized by the decision in *Wallis v. Swinburne* (a) (and not by that decision alone), I do not conceive that it defeats or is inconsistent with the claim made by the present petition. The petitioners may, as it seems to me, be right here, whether they or Mr. *Thomas Charles Ord* have or had any right of proof against the estate of Mr. *Philips* or not. Again, there is, I think, sufficient authority at least (if not enough both of principle and authority) to enable me to say that the circumstance of Mr. *Stokes*, since he made the proof in question, having been actually paid in full, and satisfied, in such a manner that his debt is gone at law, is not an answer to this application in the bankruptcy under which the proof was made. The case *Ex parte Holmes* (b) is not the only one applicable to such a point.

The question then substantially is, whether, as between the estates of the two sureties, when (one of them having become bankrupt) the creditor has proved the debt under the fiat, and has afterwards been paid in full, partly by the principal debtor, and partly by the surety, not a bankrupt,—the latter has a right to use the proof for the purpose of obtaining from the bankrupt's

(a) 1 Exch. 203.

(b) Mont. & Ch. 301.

July 25.

1848.

Ex parte  
Stokes  
and another.

estate that amount of contribution to which the bankrupt is, or but for the bankruptcy would have been liable, so far as the proof can furnish means for that end ; and I think that he has.

Where several persons are liable, each *in solido*, to a debt, the creditor may enforce payment in a manner which, as between the debtors themselves, is unjust. This must sometimes happen ; but in such cases is it not the function and the duty of a Court of Justice, at least of a Court of Equity, to place them in the same situation between themselves, as if the creditor had enforced his rights against them in a manner conformable to their rights against each other, so far as it can be done ? Generally speaking, the law of the country, as I apprehend, answers that question in the affirmative.

Now, in the present case, had Mr. *Stokes* regulated his proceedings in such a manner, a portion of what he has received from Mr. *Thomas Charles Ord's* estate would have been taken by Mr. *Stokes* from Mr. *Philips's* estate, if available for the purpose. The mere circumstance that it has not until the present time become practically available for the purpose, is, I conceive, nothing.

This has not been done ; but justice requires, I apprehend, that the nearest possible approach to that state of things shall take place, which must, I suppose, be effected by allowing the claim intended to be made by the present petition. Mr. *Clark's* estate, unless I mistake, has paid 5*s.* in the pound, but not more ; while, I collect, that Mr. *Thomas Charles Ord's* estate has paid 10*s.* in the pound, and Mr. *Philips's* estate as yet nothing.

In consequence of a reference in Mr. *Pitman's* very

useful and valuable treatise on the Law of Principal and Surety, I have looked at the case of *Greenside v. Benson* (a). The decree, as given there by Mr. *Sanders*, may perhaps be thought not without some bearing on this matter.

1848.  
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Ex parte  
Stokes  
and another.

I repeat, that it was originally equitable between these sureties, or their estates, that the benefit of the proof, or some portion of it, should go in diminution of Mr. *T. Charles Ord's* burthen; that, in my view, it was not competent to Mr. *Stokes*, by any election upon his part, to deprive Mr. *Thomas Charles Ord's* estate of that right; that it could not, I think, be defeated by delays and difficulties occurring in the liquidation or collection of Mr. *Philips's* assets, and that the right appears to me substantially to have continued and now to exist.

(a) 3 Atk. 248.

Ex parte ELIZABETH MASTERS MILES and  
WILLIAM MAY.—In the matter of JOHN  
PORTER.

THIS was the petition of sureties praying to be admitted to stand in the place of a creditor, who had proved for the amount of the debt secured, and to receive the dividends upon the proof.

The bankrupts, Messrs. *Porter & Co.*, cheese factors, at Yarmouth, in Norfolk, opened an account with the

November 4.  
In a continuing limited guarantee, there was a proviso that, if the creditors received a dividend from any estate of the principal debtor, it should not be taken in discharge of the

guarantee, but that the creditors should be entitled to recover on the guarantee to the full extent of the limit notwithstanding. On the bankruptcy of the principal debtors the creditors proved and, before receiving any dividend, obtained payment from the guarantors to the extent of the limit: *Held*, that the guarantors were not entitled to stand in the place of the creditors, as to so much of the proof as was equal to their payment.

1848.

Ex parte  
MILES  
and another.

National Provincial Bank of England; and in the month of July, 1845, the petitioners, together with one *Edward Sewell*, who was then a partner of the petitioner, *William May*, on the application of the bankrupt entered into and signed a guarantee to the bank as follows:

“ In consideration that the Joint Stock Banking Company, called the National Provincial Bank of England, at our request will allow Messrs. *John Porter & Co.*, cheese factors and dealers, Yarmouth, to continue to have and keep a banking account with the said Joint Stock Banking Company, and will not require immediate payment of the balance now due from him to them on such account, we do hereby jointly and severally undertake and agree with the said Joint Stock Banking Company to guarantee to the said Joint Stock Banking Company, of whomsoever the same now consist or may hereafter consist, the due payment of the said banking account. And we hereby promise and agree with the said Joint Stock Banking Company that the said *John Porter & Co.*, their executors or administrators, shall upon demand from time to time, and at all times hereafter, reimburse and fully pay and satisfy to the said Joint Stock Banking Company, of whomsoever the same may from time to time consist, all and every such sum and sums of money as are now or may at any time or times be due and owing from the said *John Porter & Co.*, or their executors or administrators, to the said Joint Stock Banking Company, of whomsoever the same may consist, upon the said banking account, or any other account whatsoever, and all and every sum or sums of money which the said Joint Stock Banking Company, of whomsoever the same may consist, shall or may at any time or times have lent or advanced to the said *John Porter & Co.*, or have paid or be-



come liable to pay for them, and all and every sum and sums of money which the said Joint Stock Banking Company have paid, lent or advanced to or for the said *John Porter & Co.*, or become liable to pay for the said *John Porter & Co.*, and all and every sum or sums of money which may at any time be due to the said Joint Stock Banking Company, by name of the said *John Porter & Co.*, having at any time accepted, drawn, indorsed, paid or negotiated any bill or bills of exchange, draft or drafts, note or notes, order or orders, or other liabilities, security or engagement whatever, and wherever the same shall have been drawn, accepted or negotiated, paid or indorsed by the said *John Porter & Co.*, alone or by them jointly with any other person or persons, or by name of the said Joint Stock Banking Company, having at any time or times discounted, paid or credited, or taken, or received from the said *John Porter & Co.*, or from any other person or persons; and wherever on or by reason of the said banking account or otherwise, any bill or note, or bills or notes, accepted, made, drawn, indorsed or negotiated by the said *John Porter & Co.*, alone or jointly with any other person or persons whatsoever, and also all and every sum or sums of money which the said Joint Stock Banking Company, or any officer or officers thereof, have laid out, paid or advanced or are or shall become in anywise liable to pay or advance to any person or persons whomsoever to, for or on the credit of the said *John Porter & Co.*, alone or jointly with any other person or persons, together with all such commissions, lawful charges and allowances at any time due to the said Joint Stock Banking Company, upon or by reason of the said account, and for advancing and paying such bills, drafts, notes, orders, noting,

1848.

Ex parte  
Miles  
and another.

1848.

Ex parte  
MILES  
and another.

liabilities, securities and engagements as are usually charged by bankers in such and the like case, or as may be lawfully agreed to be paid by the said *John Porter & Co.*, and also interest after the rate of 5l. per cent. per annum for such sums as they may be in advance or in balance against the said *John Porter & Co.*, alone or jointly as aforesaid; provided always this guarantee is not to extend our liability beyond the sum of 600l. And we further agree that this guarantee is to be a continuing one, and that if the said Joint Stock Banking Company shall at any time receive any dividend or dividends on any estate of the said *John Porter & Co.*, such dividends shall not go or be taken as in discharge of any part of this guarantee, but the said Company shall be entitled to recover on this guarantee to the full extent of the said sum of 600l. notwithstanding any such dividends. And further that it shall and may be lawful for the said Joint Stock Banking Company at any time to compound with the said *John Porter & Co.*, for the whole or any portion of his liabilities to the said Joint Stock Banking Company, or to give him such time for paying the same or any part thereof, as to the said Joint Stock Banking Company may seem fit, and that without releasing or in any way affecting our liability to the said Joint Stock Banking Company under this guarantee."

The fiat issued on the 4th of March, 1848.

The Banking Company proved for a sum considerably exceeding 600l., and then called upon the petitioners for payment to that extent upon their guarantee. The petitioners having paid accordingly 600l. to the company, now petitioned, seeking a declaration that to the extent of the sum of 600l., so paid by them, they

were entitled to the benefit of the proof, and praying that an apportionment might be made of the proof accordingly, as between them and the company; and that as well so much of the dividend already declared as should be payable, in respect of what might be apportioned for their benefit, as the future dividends thereon, might be ordered to be paid.

1848.

Ex parte  
Miles  
and another.

Mr. *Swanston* and Mr. *Goodeve*, in support of the petition.—The proviso does not exclude the ordinary right of a surety, sought to be enforced by the petition. The banking company have not received any dividend, and, therefore, there is no place for the operation of the clause. The proviso is not addressed to indirect equities like that now in question, but merely affects the direct right to recover against the guarantors themselves. It addresses itself to an antecedent right to recover against them. But the recovery has taken effect, and the object of the clause has been accomplished. Therefore, the stage which the clause contemplates is passed, and the clause has no operation. The bank might have received the dividend before they had called upon the sureties, and then, perhaps, they might have availed themselves of this proviso, unusual and inequitable as it is. It is of constant occurrence in bankruptcy, that the order in which a creditor, having various securities, avails himself of them, affects considerably the extent to which he is able to obtain better terms than the general body of creditors. Suppose the bank had recovered the 600*l.* from the surety before the proof, could they then have prevented the surety from having the benefit of a proof to the extent of 600*l.*? They referred to *Ex parte Holmes (a)*.

(a) Mont. & Ch. 301.

1848.

Ex parte  
MILES  
and another.

Mr. *Bacon* and Mr. *J. T. Humphreys*, for the respondents, were not called upon.

The VICE-CHANCELLOR said, that he considered the claim made by the petitioner inconsistent with the proviso in the guarantee, the creditors not having yet received 20s. in the pound; and his Honor dismissed the petition without prejudice to a subsequent application, in the event of the creditors being paid in full.

Ex parte THOMAS LEE.—In the matter of JONATHAN HIGGINSON and RICHARD DEANE.

Nov. 9 and 15.

A mortgagee of West India estates, sold under a fiat, had obtained an order to bid, and was the only bidder for them. They were sold subject to other large incumbrances, the particulars of which were not at the time fully ascertained. On a petition to open the biddings, offering more than twice the amount at which the equity of redemption had been knocked down, and payment of the former bidder's costs: *Held*, a proper case for such an order upon terms similar to those adopted in Chancery.

*Quærs*, whether the practice in Chancery, generally, as to opening biddings, ought to be adopted in Bankruptcy.

THIS was a petition to have the biddings opened of certain estates in Barbadoes, called the Springhead and Taitt's plantations, which had been sold under the fiat, before Mr. Commissioner *Ludlow*, at Liverpool.

Sir *Samuel Osborne Gibbs*, a mortgagee, (who had obtained leave to bid, by an order of the Court, made upon his petition on the 28th of February, 1848,) attended at the sale, and being the only bidder, was declared the purchaser for 500*l.*, subject to an annuity of 600*l.*, for the life of Lady *Palmer Ackland*, then aged seventy years, and to a debt due to Messrs. *Nelson* and *Adam* of 7500*l.*, and to a legacy of 1000*l.*, payable to *Philip Osborne Gibbs*. No deposit had been

paid, none being payable, according to the conditions, until October 1st.

On the 22nd of July, 1848, the petitioner applied to the assignees, and made an offer to advance 500*l.* over and above the sum of 500*l.* which had been bid by Sir *J. Osborne Gibbs*, and to pay all proper costs, charges and expenses occasioned by his bidding at the sale. By his present petition, he offered 750*l.* above that amount.

The petition was presented on the 3rd of August, and was supported by an affidavit of the above facts.

In opposition to it, Sir *Samuel Osborne Gibbs* deposed, that on the 17th of December, 1847, he had applied to the petitioner for an advance of 7500*l.*, to enable him to pay the debt arising to Messrs. *Nelson and Adam*, and that on that occasion the deponent explained to Mr. *Lee* fully the nature of his arrangements in relation to the mortgaged premises; that the petitioner declined the proposal, and Mr. *Lee* did not then, or at any time afterwards, express to the deponent a wish to have any further particulars in relation to the incumbrances. He further deposed, that on the 25th or 26th of April, 1848, before the sale, he saw the petitioner, who urged him to apply for or allow of the postponement of the sale, on the ground that at a later period he should get a higher price for the property; but did not then, or at any other time, state as a reason for such postponement, any want of knowledge on the part of the petitioner with regard to the incumbrances upon the estate. Another witness deposed, that on the 26th of April, 1848, he accompanied Sir *Samuel Osborne Gibbs*, as his agent, to the sale, and was present before the sale commenced, and during the whole period

1848.

Ex parte  
LEE.

1848.

Ex parte  
Lxx.

of its continuance, and that the particulars and conditions of sale were read over distinctly by one of the solicitors to the fiat, and that no explanation whatever was asked by the petitioner, or by any other person or persons in relation thereto; nor was any complaint made by any one that there was any defect of information as to the incumbrances on the premises, or any of such incumbrances, or as to any other matter.

Two of the assignees deposed, that the Commissioner informed them, in the presence and hearing of the petitioner, that the biddings should, at the then intended sale, remain open until the 1st of October.

Mr. *Wigram* and Mr. *Freeling*, in support of the petition, referred to *Ex parte Hutchinson* (a), *Ex parte Partington* (b), *Ex parte Martin* (c).

Mr. *Bacon* and Mr. *Piggott*, for Sir *Samuel Osborne Gibbs*. The practice in Chancery has been disapproved of, and has never been conclusively adopted in Bankruptcy. There is reason for a distinction, because in Chancery there is a stage between the order nisi and the order absolute, and there is considered to be no contract until the latter is made. *White v. Wilson* (d), *Executors of Fergus v. Gore* (e); *Sugden* on Vendors and Purchasers (f). Even in Chancery, where the order confirming the sale has been made absolute, the biddings cannot be opened, except in case of fraud or other special circumstances.

The VICE-CHANCELLOR.—Whether the practice in

(a) 2 Mont. &amp; A. 727.

(b) 1 B. &amp; B. 209.

(c) 2 Moll. 446.

(d) 14 Ves. 151.

(e) 1 Sch. &amp; Lef. 350.

(f) p. 61.

the Court of Chancery of opening biddings has any bearing upon the present case, I do not say. It is not necessary to express an opinion upon the point. I am satisfied, however, that neither the practice in Bankruptcy nor the practice in Chancery render it incumbent on me to refuse this application, which I think sufficiently supported by the circumstances of the case.

1848.  
Ex parte  
LEE.

The Order was as follows :—

“The said petitioner, by his said counsel, hereby undertaking to give the sum of 1250*l*. for the purchase of the said estates or plantations, and to pay to the said purchaser, Sir *Samuel Osborne Gibbs*, his costs, charges, and expenses of and occasioned by his bidding for and being declared the purchaser of the said estates or plantations, and of and occasioned by this application, this Court doth order that it be referred to the Commissioner of Her Majesty's Court of Bankruptcy acting in the prosecution of the fiat in Bankruptcy, awarded and issued against the said bankrupts, to allow of a better purchase of the said estates or plantations, and to proceed to a resale of the said estates or plantations; and that the biddings be opened at the sum of 1250*l*., the said petitioner, *Thomas Lee*, by his said counsel, hereby undertaking to bid that sum on such resale.”

Ex parte JOHN GEORGE MEYER.—In the matter of EDWARD SIMEON MEYER and THOMAS GEORGE BROWNSMITH, Bankrupts.

December 20.

A partner, in the name of the firm, drew a bill upon an accommodation acceptor, and with the monies obtained by discounting the bill, paid workmen employed by the firm, but the other partner was not consulted respecting the proceeding, and was ignorant of it. The firm became bankrupt:  
Held, that the accommodation acceptor, who had paid the bill, was entitled to prove against the joint estate.

THIS was a petition complaining of the rejection of a proof upon a bill of exchange.

The petitioner was the brother of the bankrupt *Meyer*. On the 27th of August, 1847, the petitioner, at the request of the bankrupt *Meyer*, and for the accommodation of him and his partner, *Thomas George Brownsmith*, accepted and handed over to the former a bill of exchange for 85*l.* 14*s.*, which was dated the 26th of August, 1847, and was drawn by the bankrupt *Meyer* in the style or firm of *Meyer and Brownsmith*, under which the bankrupts carried on business, and was payable to the order of the firm three months after the date thereof.

On the 25th of September, 1847, the bankrupt *Meyer* applied to a Mr. *Levy* to discount the bill for the firm, stating that he wanted the money to pay the men, employed by the firm in their business of fringe manufacturers, their wages that evening; but Mr. *Levy* declined to discount the bill on that day, wishing for an opportunity to inquire as to the responsibility of the petitioner, the acceptor of the bill.

The bankrupt *Meyer* then stated to Mr. *Levy*, according to the fact, that the petitioner had accepted the bill for the accommodation of the bankrupts, and that they were to provide for the same. Mr. *Levy* thereupon, and at the particular request of the bankrupt *Meyer*, gave to him a cheque for 20*l.*, as a loan upon the security of the bill, and in part of the amount thereof, if he ultimately



agreed to discount it, being a sum which the bankrupt *Meyer* named as sufficient to pay the wages.

On the 29th of September, 1847, Mr. *Levy* gave to the bankrupt *Meyer* the balance of the bill, less the discount thereof.

On the 26th of October, 1847, the fiat was issued.

In consequence of the bankruptcy, Mr. *Levy* applied to the petitioner to pay him the amount of the bill, and the petitioner paid to Mr. *Levy* the sum of 45*l.* in part payment thereof. A meeting being held under the fiat for a proof of debts and a declaration of a dividend, on the 10th of July, 1848, the petitioner requested Mr. *Levy* to prove the balance of the debt under the fiat, and to receive the dividend thereunder, in further relief of the petitioner's liability, which Mr. *Levy* consented to do, and accordingly attended at such meeting, and tendered such proof, which was objected to by the assignees upon the ground that Mr. *Levy* had exonerated the bankrupts from the liability of the bill by giving time to the petitioner.

Mr. *Levy*, knowing that he should receive the balance of the bill from the petitioner, did not persevere in his application, which was thereupon disallowed.

On the 20th of July, 1848, the petitioner paid Mr. *Levy* 40*l.* 14*s.*, being the amount remaining due to Mr. *Levy* upon the bill.

At another meeting held under the fiat, on the 9th of November, 1848, for a proof of debts and a declaration of dividends, the petitioner applied to be allowed to prove against the joint estate for 85*l.* 14*s.*, being the amount paid by the petitioner. The proof was rejected upon the grounds that Mr. *Levy* had already unsuccessfully attempted to prove on the bill, and because the

1848.

Ex parte  
MEYER.

1848.

Ex parte  
MEYER.

Commissioner suspected that the transaction was fraudulent between the petitioner and the bankrupt *Meyer*, inasmuch as the bankrupt *Brownsmith* stated that he did not know anything of the bill.

Mr. *Swanston* supported the petition.

Mr. *Russell* and Mr. *Aspland*, for the assignees, cited *Dunn v. Lowndes* (a). *Headley v. Bainbridge* (b), *Hazlewood v. Towny* (c); and contended that the bankrupt *Meyer* had no authority to bind the firm by such a transaction.

Mr. *Swanston* in reply.

The VICE-CHANCELLOR.—I think that such a bill as this binds the partnership. A claim, at least, must be entered. The respondent's counsel may examine the petitioner, if he think fit.

Mr. *Meyer* was then sworn and examined, but nothing further was elicited.

The VICE-CHANCELLOR said that he must allow the proof.

Ordered accordingly. No costs.

(a) 3 Campb. (b) 2 Gale & Dav. 483. (c) 1 Dav. & Mer. 700.

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**Ex parte JOHN BINGLEY and SAMUEL ELLISON.**—In the matter of **MARTIN CARWOOD.**

**THIS** was the petition of the assignees appealing from an order of the Commissioner, for payment, out of the estate of the bankrupt, of a dividend upon a partnership debt due from him and his deceased father.

The fiat was issued on the 2nd of March, 1848.

On the 6th of January, 1846, *John Carwood*, the father of the bankrupt, died, after carrying on business for several years in partnership with the bankrupt, as iron-founders, under the style or firm of "*John Carwood & Sons.*"

From the 6th of January, 1846, to the date of the fiat, the bankrupt carried on business on his sole account.

On the 20th of April, 1848, the respondents, *William Beckett* and *John Smith*, of Leeds, bankers, proved a debt of 9214*l.* 6*s.* 6*d.*, under the fiat, against the joint estate of *John Carwood*, deceased, and *Martin Carwood*.

According to the books of the firm of *John Carwood & Sons*, and according to the balance sheet of the bankrupt filed with the proceedings, there appeared to be a considerable amount of debts due to the joint estate of *John Carwood* and *Martin Carwood*, amounting to 836*l.* 7*s.* or thereabouts, some of which were stated to be good debts.

Part of the joint estate of *John Carwood* and *Martin Carwood* consisted of a moiety in certain letters-patent granted to them.

At a sitting under the fiat on the 11th of August, 1848, before Mr. Commissioner *West*, the official assignee

November 9.

Where a surviving partner became bankrupt: *Held*, that a creditor of the firm might receive dividends out of the bankrupt's estate with the separate creditors.

1848.

Ex parte  
BINGLEY  
and another.

stated to the Court that there was only one estate, viz., the estate of *Martin Carwood*, out of which a dividend could be declared, and on that day the Court made an order for the payment of a dividend of 3s. in the pound to all the creditors who had proved debts against *Martin Carwood's* separate estate, and also upon the above mentioned debt of 9214l. 6s. 6d., due to *William Beckett* and *John Smith* from *Martin Carwood*, as surviving partner of *John Carwood*.

No order had been made for keeping distinct accounts of the joint and separate estate.

The prayer was that the separate estate of *Martin Carwood* might be distributed amongst the separate creditors of *Martin Carwood* only, and that the order of dividend might be declared void and rescinded.

*Mr. Russell* and *Mr. J. V. Prior* for the appeal. Although it may be true that if there had been no bankruptcy the respondents could have recovered against the separate estate of the surviving partner, yet under the administration of assets in bankruptcy the law is different, and the joint creditors can only prove against the joint estate. *Ex parte Bamed* (a); *Ex parte Wilson* (b).

*Mr. Swanston* was for the respondents.

THE VICE-CHANCELLOR.—It is not suggested that the respondents have received or claimed any peculiar benefit or privilege in the character of joint creditors of the bankrupt and his deceased partner. That being so, I think that the form and shape of the proof were immaterial.

(a) 1 Gl. & J. 309.

(b) 3 M. D. & D. 57.

These creditors appear to have acted uniformly upon the notion that they were ordinary separate creditors of the bankrupt. I think that they were entitled so to act, and that they have done nothing to deprive them of this right. Therefore, on their waiving and relinquishing their securities against the separate estate of the son, and such rights (if any) as they would have as joint creditors of the father and son, let the petition be dismissed with costs out of the estate. If I meant in *Ex parte Wilson* to decide anything at variance with this view, I consider that decision wrong; but I do not think that I did. I found the classification there made already.

1848.

Ex parte  
BINGLEY  
and another.



# INDEX.

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## ACCOUNTANT IN BANKRUPTCY.

*See* COSTS, 4.

## ACCOUNTS.

*See* COMPOSITION DEED, 1; SOLICITOR, 3.

## ACQUIESCENCE.

1. Consent by bankrupt to the insertion of the advertisement forthwith held no acquiescence in the validity of the fiat. *Ex parte Gould*, 29.

2. An apology and petition to be discharged from custody and other proceedings by a party committed for contempt under the order of commitment, and the consequential orders, held not to preclude the party committed from disputing the validity of the commitment. *Ex parte Van Sandau*, 55.

*See* PARTICULARS OF DEMAND.

## ACT OF BANKRUPTCY.

1. *Seemle*, that the 1 & 2 *Vict.* c. 110, s. 8, is not repealed by 5 & 6 *Vict.* c. 122. *Ex parte Goodall*, 580.

2. *Seemle*, that a lunatic cannot commit an act of bankruptcy, by omitting to pay or give security. *Ex parte Stamp*, 345.

## ADJOURNMENT.

*See* ASSIGNEES, 1.

## ADJOURNMENT SINE DIE.

*See* BANKRUPT, 1.

## ADJUDICATION.

*See* FIAT, 4.

## ADVERTISEMENT.

The official assignee represents the creditors sufficiently to enable the Court to suspend the advertisement by consent before the choice of creditors' assignees, although the bankruptcy is not disputed. *Ex parte Potts*, 326.

*See* ACQUIESCENCE, 1.

## AFFIDAVIT.

Affidavit of debt filed under 1 & 2 *Vict.* c. 110, s. 8, ordered to be taken off the file with the creditors' consent. *Anonymous*, 334.

*See* COMMITMENT, 4; PARTICULARS OF DEMAND.

## AGREEMENT.

*See* STATUTE OF FRAUDS.

## ALLOWANCE.

*See* COMPOSITION DEED, 1.

## AMENDING.

*See* FIAT, 1.

## ANNULLING.

1. A fiat issued by a bankrupt against himself may be legally and equitably valid, although he may have been party to acts of fraudulent preference.

It is not sufficient ground for annulling such a fiat, that it was issued mainly for the purpose of protecting the bankrupt against proceedings at law, or without a predominant wish to benefit his creditors.

Where, at the time of a fraudulent preference, the bankrupt was a trader, and there remains due a debt which was then owing and which would support a creditors' fiat, *semble*, that such fraudulent preference may be impeached under the bankrupt's own fiat.—*Held*, that such fraudulent preference does not of itself constitute a sufficient ground for annulling such a fiat against the bankrupt's consent at the instance of a creditor who proposes to sue out a fresh fiat, especially if there is any doubt as to the competency of such creditor to sue out a fresh fiat.

*Quære*, whether a creditor who detains a bankrupt in execution till he is discharged by his certificate, is competent, if the fiat be annulled, to issue a new one.

*Quære*, whether, on the first fiat being annulled, the creditor can again take the body of the debtor in execution, or whether the debt is satisfied. *Ex parte Norton*, 504.

2. Bankrupt's own fiat annulled with his consent and consent of assignees, to enable a creditors' fiat to be sued out, under which transactions between the bankrupt and others might be impeached. *Ex parte Louch*, 463.

Form of order as to costs. *Ibid*.

3. On an application to annul the bankrupt's own fiat, to give effect to one to be sued out by a creditor, for the purpose of setting aside trust deeds, there should be an affidavit, shewing that the debt of the proposed petitioning creditor is old enough to overreach the deeds. *Ex parte Thomas*, 612.

4. The 5 & 6 *Vict.* c. 122, s. 8, providing that no fiat shall be invalid by reason of the act of bankruptcy being concerted, does not enable a

creditor to sue out a fiat founded on a trust deed executed with his concurrence; and such a fiat may be annulled at the instance of another creditor. *Ex parte Payne*, 534.

5. Non surrender by the bankrupt is no objection to his petition to annul the fiat, if the petition be presented before the time for surrendering has expired.

The circumstances that the bankrupt has taken the benefit of the Insolvent Debtors Act, and that the petitioning creditors' debt was included in the schedule, held insufficient grounds for annulling the fiat. *Ex parte Garnett*, 95.

6. Petition of bankrupt to annul the fiat heard, although he had not surrendered, the time for his surrendering having expired between the presentation of the petition and the hearing. *Ex parte Hodson*, 374.

7. *Semble*, a man who has ceased to trade cannot sue out a fiat against himself, unless he owes a debt contracted during the trading, which would support a creditors' fiat.

A creditor who has successfully opposed an application by an insolvent for relief under 5 & 6 *Vict.* c. 116, on the ground that he is a trader, cannot afterwards petition to annul a fiat sued out by the insolvent himself for want of trading. *Ex parte Mitchell*, 257.

8. Where the fiat was sued out by the bankrupt on September 19, and assignees were chosen on October 9, and the certificate allowed on December 14:—*Held*, that a creditor's petition to annul, presented on December 14, was not too late. *Ex parte Dering*, 398.

See OFFICE FEES, 3, 4, 5; PROCENDO.

## APPEAL.

An appeal from a series of orders of the Court of Review permitted under the circumstances to be by



way of petition. *Ex parte Van Sandau*, 55.

See JURISDICTION, 1.

### ASSIGNEES.

1. A creditor whose proof has been neither admitted nor rejected, but only adjourned, cannot be heard on his petition to set aside the choice of assignees.

At the sitting for the choice of assignees under the bankrupt's own fiat, all the creditors but two appeared by the bankrupt's solicitor, and the proof of the two was adjourned for further evidence; the other creditors then chose assignees, and afterwards the proof of the two was admitted on further evidence.—*Held*, sufficient grounds for a new choice. *Ex parte Morse*, 478.

2. Where one of several trustees of a charitable society became bankrupt, and his co-trustees tendered a proof for the amount due from him to the charity, and on the Commissioner refusing to admit the proof without an order of the Court, an order was obtained, and the debt proved by the co-trustees in pursuance thereof:—*Held*, that the co-trustees were not creditors entitled to vote at the choice of a creditors' assignee, and they having been the only persons voting, the choice was set aside and a new one directed. *Ex parte Rowe*, 111.

3. Assignees who had brought an action against an annuity creditor of the bankrupt on a cross demand, were, on the petition of the creditor submitting to the jurisdiction of the Court, restrained from proceeding in the action.

*Seemle*, that the Commissioner had no jurisdiction to value the annuity, for the purpose of its value being set off in an action. *Ex parte Law*, 378.

4. Where an assignee bought in without an order, he was ordered to

make good the loss occasioned by a resale. *Ex parte Gover*, 349.

5. Where a creditor's assignee omitted to pay over to the official assignee the balance in his hands, and the Commissioner had directed the payment with 20l. per cent. upon the amount:—*Held*, that application should be made to the Commissioner to enforce his order, and creditors were not allowed the extra costs occasioned by applying to the Court of Review.

The 6 Geo. 4, c. 16, s. 104, directing payment of 20l. per cent. by assignees retaining part of the estate in their hands, means 20l. per cent. per annum.

*Seemle*, that the offer of a cheque on a banker at a town where the estate has no banker, is not a proper tender by a creditors' assignee to the official assignee. *Ex parte Cunliffe*, 408.

6. Where a stock legacy bequeathed to the bankrupt had been transferred into the names of the official assignee and the creditors' assignee, and the former survived the latter, and left the country and became bankrupt:—*Held*, that the Court might, on the petition of the new official assignee of the original bankrupt served upon the bank and the assignees of the former official assignee, direct the funds to be transferred to the Accountant in Bankruptcy, and that a petition under Sir Edward Sugden's act was unnecessary. *Ex parte Pennell*, 566.

See COMMISSIONERS OF BANKRUPT, 2; COMPOSITION DEED, 1; MORTGAGE, 5; OFFICIAL ASSIGNEE; SOLICITOR, 2.

### AUDIT.

See COMPOSITION DEED, 1; SOLICITOR, 3.

### BANKERS.

See FRIENDLY SOCIETY.

## BANKRUPT.

1. Where a bankrupt was examined before the Commissioner respecting a book which the bankrupt stated that he had destroyed, the Commissioner, thinking upon evidence produced before him that the book had not been destroyed at the time stated by the bankrupt, adjourned the examination sine die: the Court directed the examination to proceed. *Ex parte Gibbs*, 1.

2. Where the bankrupt, after having been committed, had been twice brought up to be re-examined, and had been re-committed, the Court declined to order him to be brought up again at the expense of the estate. *Ex parte Rothery*, 565.

3. On a petition for the appointment of a new trustee in the place of the bankrupt, and that the new trustee might use the bankrupt's name in certain proceedings, the petitioners were ordered to pay the costs of the bankrupt and the assignees to them respectively. The bankrupt, who was a solicitor, and acted for himself in the matter of the petition, had not obtained his certificate.—*Held*, that the costs ordered to be paid to the bankrupt belonged to him, and did not pass to the assignees. Practice under the new orders as to issuing writs of execution. *Ex parte Grimstead*, 72.

See ACQUIESCENCE, 1; ANNULING, 5, 6, 7; COMMITMENT, 4; COMPOSITION DEED, 4; COSTS, 3, 4, 5; FIAT, 2, 3; PROTECTION; PUBLIC COMPANY, 1; SURRENDER; VENUE, 3.

## BANKRUPTCY.

See ACT OF BANKRUPTCY, 2.

## BEGIN, RIGHT TO.

A solicitor appearing on a summary application to answer the matters of an affidavit has the right to begin. *Ex parte Shuckhard*, 454.

## BILL OF EXCHANGE.

1. A customer pays in bills of exchange to his bankers and becomes bankrupt. The bankers prove for the whole balance due from him, and afterwards some of the bills of exchange paid in are paid in full by other parties liable, some before and some after the dividend is declared.—*Held*, that the proof ought to be reduced by the amount of the paid bills and the dividends refunded. *Ex parte Hornby*, 69.

2. A firm of three partners agreed to make advances to a consignor upon certain terms as to commission, and as to a lien on the return proceeds of the shipments. They accepted on the face of this agreement bills drawn on them by the consignor; and, on one of those bills approaching maturity, they requested the holders to give them an extension of time, which the latter agreed to do, on having the acceptance of a distinct firm of six, in which the three were also partners. A bill was accordingly drawn by the three, accepted on behalf of the six, and endorsed by the consignor, to whose credit it was carried by the holders of the former bill. Afterwards the holders were parties to an arrangement between the consignor and his creditors, whereby they released the consignor and the shipments from all liability in respect of the bills.—*Held*, that they thereby discharged the firm of six. *Ex parte Webster*, 414.

See PROOF, 2.

## BOND.

See PROOF, 1.

## BREACH OF TRUST.

1. Executors pay the legacies bequeathed to infants to their father, who invests them on colonial securities, and makes large profits, and becomes bankrupt.—*Held*, that the legatees were entitled to have proof

made upon the whole amount of the profits. *Ex parte Montefiore*, 171.

2. A testator directed that it should be lawful for his wife to retain in her hands, and employ any sum not exceeding 6000*l.* in carrying on the trades in which he might be engaged at his decease, and he appointed his wife and son executrix and executor. The widow carried on the testator's trade, taking the son into partnership, and the monies received were placed with the bankers to their joint account.—*Held*, on their bankruptcy, that the employment of 6000*l.* of the assets in the trade so carried on was authorized by the will, and gave no right of proof in competition with the other creditors, and that the circumstance of the son being taken into partnership made no difference. *Ex parte Butterfield*, 319, 570.

*See* PROOF, 5.

BREWER.

*See* NOTICE.

BROKERS.

*See* PARTNERS.

CERTIFICATE.

A creditor, who before the fiat has taken a bankrupt in execution, cannot be heard on the merits of his petition to stay the certificate, unless he discharges the bankrupt. *Ex parte Norton*, 504.

*See* BANKRUPT, 3.

CHEQUE.

*See* FRAUDULENT PREFERENCE, 2.

CHOICE.

*See* ASSIGNEES, 2.

CLERK.

A trader borrowed 550*l.* under an agreement by which the lender was

to become his clerk at a salary of 22*l.* 10*s.* a year. The trader agreed to produce his accounts and balance-sheet to the lender, who was to get in the debts, and alone to draw cheques on the banking account. If the balance was in the trader's favour at any time, he might draw to the amount of it. On payment of the loan, or on proceedings being taken to recover it, the agreement was to be at an end. The lender was to have the option of becoming a partner. On the trader becoming bankrupt.—*Held*, that the lender was a clerk, entitled to payment of three months' salary in full; and that the circumstance of the clerk having been absent from business owing to ill health, for the three months immediately preceding the bankruptcy, with the bankrupt's sanction, did not take away this right. *Ex parte Harris*, 165.

COMMISSION.

*See* PROCEDENDO.

COMMISSIONER OF BANKRUPT.

1. The Vice-Chancellor will not, under the jurisdiction in bankruptcy, direct the accountant in bankruptcy to pay the compensation pension of a retired Commissioner of Bankrupt to his assignee, under the Insolvent Debtors Act. *Ex parte Spooner*, 575.

2. Order for payment of retiring pension of Commissioner of Bankrupt to his assignees, in an unopposed case. *Ex parte Corser*, 576, *note*.

*See* SOLICITOR, 3; FIAT, 4; TENANT IN TAIL.

COMMITMENT.

1. An order of commitment, under the act 8 & 9 *Vict.* c. 127, s. 3, ought not to be made *ex parte*. *Ex parte Shuckhard*, 454.

2. An order of commitment should contain an express adjudication that a contempt has been committed. *Ex parte Van Sandau*, 55.

3. Although an order of commitment should contain an express adjudication that a contempt has been committed, the want of an express adjudication is not sufficient ground for discharging the order.

Such an order may direct the party committed to pay the costs of the party complaining, but not his costs, charges and expenses.

When the party complaining obtained a warrant for the apprehension of the party ordered to be committed, and delivered it to the officer by whom it was executed, and afterwards the party committed was discharged on his own application, and various orders were made, founded on the commitment; and it afterwards appeared that the warrant was, by an oversight, not sealed:—*Held*, that the commitment was invalid, that the consequential orders ought to be discharged, and that the party committed was entitled to recover damages from the party obtaining the process.

On a petition to the Court of Review, for an injunction to restrain an action in which the plaintiff has demurred to the plea, the Court makes a qualified order, restricting the plaintiff as to the grounds of demurrer. On appeal, this order is discharged, and the respondents present a petition to the Lord Chancellor for an unqualified injunction.—*Held*, to be an original petition which ought not to be presented to the Lord Chancellor, and dismissed with costs. *Ex parte Van Sandau*, 303.

4. A bankrupt was committed by a subdivision Court until he should submit to the subdivision Court or any of the Commissioners, and full answer make to their satisfaction. The bankrupt afterwards appeared before the Commissioner who was

acting in the prosecution of the fiat, for the purpose of passing his last examination, when, it appearing that he had not filed his balance-sheet within the requisite time, the Commissioner adjourned the last examination. The bankrupt, upon that occasion, reiterated an unsatisfactory statement, for which he had been committed, with an addition, which the Commissioner held to be no ground for his discharge, and the Commissioner made no order thereupon. The bankrupt was then taken back to custody.—*Held*, that his further detention was illegal, without a second warrant.

*Semble*, that it is not necessary under such circumstances that the bankrupt's further statement should be satisfactory to the Commissioners forming the subdivision Court; but that the bankrupt answering to the satisfaction of the Commissioner acting in the prosecution of the fiat, is entitled to his discharge.

*Quære*, whether under the present law a commitment until the bankrupt shall answer to the satisfaction of the Commissioners forming the subdivision Court, or any of the Commissioners of the Court, is good?

Affidavits may be read both on behalf of the prisoner and of those opposing his discharge on return to an *habeas corpus*. *Ex parte Martin*, 485.

See ACQUIESCENCE, 2; BANKRUPT, 2; JURISDICTION, 1, 2, 3; ORDER, 1.

## COMPENSATION ANNUITY.

See COMMISSIONER OF BANKRUPT, 1.

## COMPOSITION DEED.

1. Trustees, under an assignment for benefit of creditors, employ an agent to proceed to America to recover part of the assigned property; afterwards the debtors become bank-

rupt, and three of the trustees are appointed assignees. — *Held*, that under the circumstances of the case, the assignees ought to be allowed in their accounts the expense of employing the agent.

For the purpose of bringing expenses within the description of just allowances, it is not necessary to shew that they have actually benefited the estate, if there was a fair probability of their so doing.

Where there had been no audit of the assignees' accounts, and large sums had been received by them, it was *held*, that the official assignee acted properly in calling for an audit, although twenty-five years had elapsed since any step had been taken, and no creditor made any complaint; but the Court being of opinion that the official assignee might with little difficulty, and at a small expense, have satisfied himself that the circumstances did not render it incumbent upon him to continue to prosecute a claim against the creditors' assignee, he was not held entitled to his full costs as against the latter, there being no estate. *Ex parte Shaw*, 242.

2. Traders executed an assignment of all their effects in trust for their creditors, and afterwards sued out a fiat against themselves, but did not apply for adjudication. Two creditors who could have sued out a fiat against the bankrupts, and who could under it have impeached the deed, applied for and obtained an adjudication. — *Held*, that the assignees could successfully impeach the deed. *Ex parte Jackson*, 609.

3. By a composition deed between *A.* and *B.* and scheduled creditors of *A.*, after reciting that it had been agreed that *A.* should pay the creditors 10s. in the pound, and after reciting that *B.* had agreed to join in the deed for the purpose of better securing payment of the composition on having such assignment made to him as was thereafter contained, —

VOL. I.

it was witnessed, 1st, that *A.* and *B.* covenanted to pay the creditors the composition; 2nd, that in consideration of this covenant, *A.* assigned all his stock in trade, machinery and effects to *B.* to hold as *B.*'s own goods and chattels; 3rd, that the creditors covenanted on receiving the composition to release *A.*

Contemporaneously with this deed the leasehold trade premises were assigned by *A.* to *B.* with the privity of the creditors.

At the time of the execution of the deed all the assigned property was in the possession of certain mortgagees of the leasehold premises and machinery, who afterwards gave up possession to *B.* on his guaranteeing payment of the mortgage money. Immediately after the execution of the deed, *B.* gave the creditors his promissory notes for the amount of the composition. *B.* remained in possession till he became bankrupt, and after his bankruptcy a fiat was sued out against *A.* by a creditor, who knew of the deed, although he had not executed it. He was a friend of *A.*, and indifferent to the payment of his debt, but permitted his name to be used by the creditors who had signed the deed for the purpose of suing out the fiat. — *Held*, 1st, that the composition deed was an act of bankruptcy, and not a sale for value; 2nd, that the assigned property was not in the reputed ownership of *B.*; 3rd, that the circumstances under which the fiat was sued out against *A.* did not prevent *A.*'s assignees from recovering the property. *Ex parte Marshall*, 273.

4. A trust deed, which could not have been impeached under a fiat sued out by any creditor, *held* incapable of being impeached under the bankrupt's own fiat. *Ex parte Philpott*, 346.

See ANNULING, 1, 4.

## CONCERTED FIAT.

See ANNULING, 4.

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## CONTEMPT.

See ACQUIESCENCE, 2; COMMITMENT, 2; JURISDICTION, 1, 2, 3; ORDER, 1.

## CONTINGENT DEBT.

1. A father bequeaths his business and stock in trade to his sons, with a declaration that a grandson, then an infant, should be admitted into the firm on attaining twenty-one, or in default thereof, that the sons, or the survivor of them, should pay the grandson 1000*l.* on his attaining twenty-one. On the bankruptcy of the surviving son, before the grandson attained twenty-one: *Held*, that there was a right of proof for the 1000*l.* as a contingent debt. *Ex parte Megarey*, 167.

2. An agreement is entered into for the sale of a ship at sea, when she should arrive at her port of discharge, for 4000*l.*, and that within one month after her arrival, or such further time as should be necessary for repairs and discharging the cargo, the purchaser should, on the execution of a bill of sale to him of the vessel, deliver promissory notes for the purchase-money; in default whereof the vendor was to be at liberty to resell, and the purchaser was, within a month after the resale, to pay the loss occasioned thereby; and if the ship was lost, the agreement was to be void. The purchaser becomes bankrupt before the ship arrives; and on the assignees declining to complete the contract, the vendor resells.—*Held*, that he could not prove for the loss occasioned by the resale. *Re Gales*, 100.

See PROOF, 1.

## COSTS.

1. The act 8 & 9 *Vict.* c. 127, s. 3, providing for the discharge of a debtor, who has been committed, on payment of the debt and costs remaining due at the time of the order of imprisonment, and "all subse-

quent costs," means, by the last expression, the costs incurred by reason of default in payment of the instalments at the times ordered by the Commissioner. *Ex parte Shuckhard*, 454.

2. Petitioner making improper and unjustifiable charges ordered to pay all costs, although he succeeds as to part of his petition. *Ex parte Norton*, 504.

3. Where a bankrupt sued out a fiat against himself, and creditors' assignees were chosen, his solicitor was ordered to be paid the amount of his bill of costs, up to the choice, out of the first monies received by the assignees. *Ex parte Parsons*, 342.

4. Under the bankrupt's own fiat, there being no probability of any choice of creditors' assignees, and the office fees of 10*l.* and 20*l.* having been paid to the Accountant in Bankruptcy:—*Held*, that they might be applied in payment of the bill of costs of the bankrupt's solicitor. *Ex parte Buchanan*, 344.

5. Bill of solicitor of bankrupt, suing out a fiat against himself, under which no assignees were chosen, ordered to be paid out of the fund in the hands of the Accountant in Bankruptcy, without making any reserve for the office fees of 10*l.* and 20*l.* The Accountant in Bankruptcy ought not to be served with the petition for payment. *Ex parte Jerwood*, 373.

See BANKRUPT, 2, 3; COMMITMENT, 3; DIVIDEND, 3; MORTGAGE, 6, 7; OFFICE FEES, 6, 8; PARTICULARS OF DEMAND; PRODUCTION; PROOF, 2, 3; SOLICITOR, 3, 4, 5; SURRENDER; VENUE, 3.

## CORPORATION.

See PETITIONING CREDITOR.

## COVENANT.

By an antenuptial settlement the intended husband covenanted to purchase a convenient residence for him-

self and his intended wife, the purchase to be made with her approbation; and if it could not conveniently be made within twelve months after the marriage, he covenanted to invest 1000*l.*, at least, in the purchase of freeholds or leaseholds, or in the funds, in the names of the trustees, till a residence could be found. Five years after the marriage the husband purchased a freehold messuage for 1600*l.*, but never conveyed it to the trustees, nor treated it as subject to the settlement. Several years afterwards he raised 1800*l.* by way of mortgage upon this messuage and other property devised to him by his father; and while some of the money thus raised remained unmixed with his general estate became bankrupt.—*Held*, that the remaining portion ought to be apportioned between the devised and purchased property comprised in the mortgage, and the proportion, attributable to the latter, paid to the trustees of the settlement; and that they had a charge upon the equity of redemption of the purchased estate for the amount (if any) by which the proportion fell short of 1000*l.* *Ex parte Poole*, 581.

*See* VENDOR AND PURCHASER.

#### COWKEEPER.

*See* TRADING, 1.

#### DEBT.

*See* PROOF; SHARES.

#### DESCRIPTION.

*See* FIAT, 2, 3.

#### DISTRESS.

*See* MARSHALLING.

#### DIVIDEND.

1. Dividend stayed to give opportunity of proving to creditors who had delayed proving for eleven years, no dividend having been declared for upwards of ten years after the fiat issued. *Ex parte Sturton*, 341.

2. Opening dividend at instance of one creditor lets in others to prove. *Ex parte Bowner*, 343.

3. Where a creditor of the bankrupt, after attending to prove, and being prevented from doing so by the other business in court, became insolvent, and the title of his assignee was not complete in time to enable the assignee to prove:—*Held*, that he must, nevertheless, pay the costs of his petition to stay the dividend, and of the requisite sitting to receive his proof, and retain them out of the insolvent's estate. *Ex parte Hughes*, 387.

*See* BILL OF EXCHANGE, 1; OFFICIAL ASSIGNEE, 1; GUARANTEE; SURETY.

#### DOCUMENT.

*See* PRODUCTION.

#### ECCLESIASTICAL COURT.

*See* PROOF, 3.

#### ELECTION.

*See* CERTIFICATE; INJUNCTION.

#### EVIDENCE.

1. *Semble*, an examination of a party before the Commissioner may be read to discredit an affidavit of the same witness made upon a petition. *Ex parte Majoribanks*, 466.

2. Examinations before the Commissioner cannot be read as evidence on a petition. *Ex parte Rees*, 205.

#### EXAMINATION.

*See* BANKRUPT, 1; EVIDENCE.

#### EXECUTION.

*See* BANKRUPT, 3.

#### EXECUTOR.

*See* BREACH OF TRUST, 1.

#### EXPENSES.

*See* COMPOSITION DEED, 1.

## FIAT.

1. Where one of the bankrupts died before the adjudication under a joint fiat, the fiat was ordered to be amended by omitting his name. *Ex parte Hall*, 332.

2. Description of a bankrupt as of a particular parish in a particular county, *held* sufficient, although the parish was partly in that county and partly in another, and the bankrupt's shop was in the other, the affidavit being produced of there being no other person of the same name and trade in the parish. *Re Woodhead*, 99.

3. A bankrupt's usual place of business for two years before the bankruptcy had been at Hounslow, but he had taken for his family a house at Durdham Down, near Bristol, where he had resided for some months previous to his bankruptcy, and contracted debts. A Bristol fiat, describing him as of Durdham Down and naming him *Clarke* instead of *Clark*, was transferred to the London Court, to which a fiat with a correct description had been issued, and the proofs were ordered to be transferred, the Bristol fiat being impounded. *Ex parte Burbidge*, 256.

4. At the sitting for opening the fiat it appeared that for securing the petitioning creditor's debt, the trader against whom the fiat was issued gave him a promissory note, which there were grounds for believing was forged. No prosecution having been instituted, the Commissioner declined proceeding with the fiat. On the petition of the petitioning creditor the Court ordered the fiat to be transferred to another Commissioner and proceeded with. *Ex parte Hind*, 161.

See ANNULING, 7, 8; OFFICE FEES, 4; PROCEDENDO; VENUE.

## FIXTURES.

See MORTGAGE, 1.

## FORGERY.

See FIAT, 4.

## FRAUD.

See NOTICE; STATUTE OF FRAUDS.

## FRAUDULENT DEED.

See COMPOSITION DEED, 2, 3, 4.

## FRAUDULENT PREFERENCE.

1. A trader being indebted to his bankers gave them a receipt for 1000*l.* purporting to be in full for the purchase of the furniture, plate, wines and effects in his house; but no possession was given of the goods till a year afterwards, when the trader's solicitor applied to the bankers on his behalf for a loan of 10,000*l.*, stating that a creditor of the trader would obtain judgment, on which he could issue execution, but that if this creditor refused to give the trader time, the bankrupt would protect himself and his other creditors. The day after this communication, and in consequence of it, the bankers sent a man to take possession, which was delivered to him by the trader, who on the same day filed a declaration of insolvency, and sued out a fiat against himself.—*Held*, that the delivery of possession was not a fraudulent preference. *Ex parte Majoribanks*, 466.

2. Payment of a debt by cheque may be a fraudulent preference.

Where such payment was made without pressure after a resolution had been come to by the debtors to suspend payment of their debts generally, it was held under the circumstances of the case a fraudulent preference, whether the debtors contemplated actual bankruptcy or not. *Ex parte Simpson*, 9.

See ANNULING, 1; PARTNERS, 2.

## FRIENDLY SOCIETY.

The rules of a Friendly Society provided that the treasurer retaining upwards of 10*l.* more than seven



days after he was required to pay it over, should be excluded from the society. They also provided that a particular firm should be the bankers of the society, with power for a general meeting to appoint other bankers.—*Held*, that the bankers for the time being were not officers so as upon their bankruptcy to entitle the society to payment in full. *Ex parte Harris*, 162.

### GUARANTEE.

In a continuing limited guarantee there was a proviso that if the creditors received a dividend from any estate of the principal debtor, it should not be taken in discharge of the guarantee, but that the creditor should be entitled to recover on the guarantee to the full extent of the limit, notwithstanding on the bankruptcy of the principal debtors the creditors proved, and before receiving any dividend obtained payment from the guarantors to the full extent of the limit.—*Held*, that the guarantors were not entitled to stand in the place of the creditors as to so much of the proof as was equal to their payment. *Ex parte Miles*, 623.

### HUSBAND AND WIFE.

*See* PROOF, 3.

### INJUNCTION.

A creditor who has proved, restrained from proceeding for the same demand in the County Court, although there is no dividend. *Ex parte Flower*, 503.

*See* ASSIGNEES, 3; COMMITMENT, 3; JURISDICTION, 2, 3.

### ILLEGAL DEBT.

*See* SHARES.

### INSOLVENCY.

*See* JURISDICTION, 4.

### INSOLVENT DEBTORS ACT.

*See* ANNULLING, 5.

### INSURANCE.

*See* PARTNERS, 1.

### JOINT DEBT.

*See* STATUTE OF FRAUDS.

### JOINT ESTATE.

*See* PARTNERS, 3, 5, 6, 7; PROOF, 5.

### JOINT AND SEPARATE ESTATE.

*See* PARTNERS, 3, 5, 6, 7; PROOF, 5.

### JURISDICTION.

1. *Quære*, whether a commitment by the Court of Review for contempt can be the subject of an appeal. *Ex parte Van Sandau*, 55.

2. One judge of the Court of Review, sitting as the Court, may commit for contempt.

In an action for the imprisonment under the commitment, the order is pleaded and the plaintiff demurs.—*Held*, that an injunction ought not to issue, limiting the plaintiff as to the particulars, in respect of which he might, on such demurer, question the validity of the order. *Ex parte Van Sandau*, 55.

3. The Court of Review has jurisdiction to restrain a party committed by it for contempt, from questioning in an action at law the regularity, propriety, or form of the order of committal. *Ex parte Turner*, 30.

4. On an application by an insolvent for a final order, under 7 & 8 Vict. c. 96, s. 6, the Commissioner remanded the insolvent (who had previously been discharged under the act), on the ground of his having recently petitioned the Insolvent Debtors Court, and that proceedings were pending there.—*Held*, that there was no appeal to the Court of Review from this order. *Ex parte Newlands*, 150.

*See* APPEAL; PRODUCTION.

## LIEN.

A debt due from a devisee to a testator does not constitute any lien upon the devised estate. *Ex parte Barff*, 613.

See COVENANT; NOTICE; PARTICULARS OF DEMAND; PARTNERS, 1; PRODUCTION; REPUTED OWNERSHIP, 2, 4.

## LIMITATIONS.

See SOLICITOR, 4.

## LUNATIC.

See ACT OF BANKRUPTCY, 2; PROOF, 4.

## MARKET GARDENER.

See TRADING, 2.

## MARSHALLING.

A landlord distrained upon goods of his tenant, and sold part of them, which were subject to a mortgage. The tenant became bankrupt.—*Held*, that the mortgagee was entitled to stand in the place of the landlord, and to be paid the amount of his mortgage debt out of the proceeds of the goods taken under the distress, which were not comprised in his security. *Ex parte Stephenson*, 586.

## MASTER.

See SOLICITOR, 7.

## MEMORANDUM.

See MORTGAGE, 7.

## MISTAKE.

See MORTGAGE, 2.

## MORTGAGE.

1. A lessee annexed tenant's fixtures and then deposited the lease, with a mortgage, with a memorandum not noticing the fixtures.—*Held*, on his becoming bankrupt, the security extended to the fixtures. *Ex parte Tagart*, 531.

2. When all parties acted under a misapprehension that a security was

for the whole amount of a debt, and twenty-one years had elapsed since the security was given, but no evidence could be produced of any contract, except one for security to a limited amount, which was exceeded by the amount received by the creditor upon his security:—*Held*, that the creditor ought not to be called upon to refund. *Ex parte Follett*, 212.

3. Where a legal mortgagee had obtained the Commissioner's order for sale of the property comprised in the security, and part of the property had been sold, and the proceeds applied in reduction of the debt, and the remainder of the property proved unsaleable, the mortgagee was permitted to give up the unsold property, and prove for the unpaid portion of his debt. *Ex parte Greaves*, 119.

4. Form of order on petition of equitable submortgagee. *Ex parte Powell*, 405.

5. Form of order upon a petition of an equitable mortgagee, who was sole creditor's assignee. *Ex parte Young*, 146.

6. Where, upon an equitable mortgagee's petition the mortgagee and the creditors' assignees appeared by the same solicitor, the Court ordered the sale to be conducted as the Commissioner should think fit, having regard to this circumstance; and the official assignee was allowed his costs of appearing separately. *Ex parte Bromage*, 375.

7. A trader deposits policies of assurance with his bankers to secure the floating balance due from him, and signs a memorandum of the object of the deposit, of which notice is given to the insurance office; afterwards he takes a partner, and the policies remain, and are treated as a security for the floating balance due from the firm, but of this change in the object of the security no memorandum is signed, nor is any notice given to the office. On the firm

becoming bankrupt—*Held*, that the bankers were entitled to the usual order, as in the case of an equitable mortgagee without a written memorandum. *Ex parte Barnett*, 194.

See MARSHALLING ; NOTICE ; REPUTED OWNERSHIP, 1, 2, 4.

### NOTICE.

The owner of a public house agreed to grant a lease of it, at a premium. The intended lessee deposited the agreement with *M. & Co.*, brewers, to secure repayment of an advance. The lease was executed, and was deposited by the lessee with the landlord's solicitor, to secure the premium. The lessee obtained it from them for the purpose, as he alleged, of producing it to the magistrates, to enable him to procure a licence. He undertook to return it forthwith; but instead of doing so, he instructed an auctioneer to obtain an advance upon it from other brewers, *R. & Co.* The auctioneer produced to *R. & Co.*'s agent an order from the lessee for the delivery of the lease to *R. & Co.*, noticing that the advance was for the purpose of enabling the lessee to pay *M. & Co.* The agent objected to recognise this memorandum, and inquired whether the lessee owed anything to *M. & Co.* He was informed by the auctioneer and the lessee that there was nothing due to *M. & Co.*, except for goods supplied. He had previously obtained from the lessee himself an order for the delivery of the lease, not mentioning *M. & Co.* at all; and he obtained the lease on delivering the order. *R. & Co.* advanced money on the deposit. On the lessee becoming bankrupt—*Held*, that the security of *R. & Co.* must be postponed to those of the landlord, and of *M. & Co.*, although there had been a demise of the legal estate on trusts, extending to the debt of *R. & Co.*, and not to the prior equities. *Ex parte Reid*, 600.

See REPUTED OWNERSHIP, 1, 2.

### OFFICE FEES.

1. On a petition to annul a fiat, with consent of creditors, the Commissioner declined to certify the consent without payment of the office fees of 10*l.* and 20*l.* Assignees had been chosen, but it was stated that there were not, and were not likely to be, any assets. The Court requested the Commissioner to certify his opinion whether there were any available assets. *Ex parte Davis*, 267.

2. Where a bankrupt sued out a fiat against himself, which was annulled, and no creditors' assignees had been chosen, the office fees of 20*l.* and 10*l.* paid by him into the bank were ordered to be returned. *Ex parte Reynolds*, 373.

3. Where a bankrupt sued out a fiat against himself, and only one creditor proved, and assignees were chosen; but there were no assets, and the office fees of 10*l.* and 20*l.* had not been paid, the Court refused to dispense with the usual certificate of the Commissioner, on an application to annul with the consent of the creditor. *Ex parte Nicholls*, 331.

4. On a petition of the bankrupt, with the consent of all the creditors, who had proved to annul the fiat, the Commissioner refused to sign the requisite certificate, unless the fees of 20*l.* and 10*l.*, payable under 1 & 2 *Will.* 4, c. 56, ss. 46 and 55, were paid. There were no assets. The fiat was ordered to be annulled, on the registrar being satisfied of the concurrence of the creditor. *Ex parte Diamond*, 143.

5. A meeting and an adjourned meeting are held for the choice of assignees, but none are chosen.—*Held*, that the payment of 1*l.*, directed by 1 & 2 *Will.* 4, c. 56, s. 53, to be made for every sitting other than any sitting for the choice of assignees, &c., was not due on either of the above sittings.

On the bankrupt petitioning to

annul the fiat, with the consent of the creditors, and the Commissioners refusing to sign the usual certificate until the above fees, and the fees of 20*l.* and 10*l.*, payable under the same act (ss. 46 and 55), were paid,—*Held*, that the fiat ought to be annulled, on payment, out of the fund realised, of the expenses, and a proper remuneration of the official assignee, to be ascertained by the Commissioner. *Ex parte Miller*, 144.

6. Where the sums of 20*l.* and 10*l.*, directed to be paid by 1 & 2 *Will.* 4, c. 56, ss. 46 and 50, had been paid out of an estate which was insufficient to pay those sums, and the petitioning creditors' costs up to the choice, the Lord Chancellor refused to order the payments to be refunded to the petitioning creditors. *Ex parte Hopkins*, 204.

7. Where an official assignee had been appointed, but although three meetings had been advertised for the choice of assignees, no creditor attended, and the bankrupt passed his last examination,—*Held*, that the bill of the solicitor to the petitioning creditor was payable out of the assets realised, although there would not then remain any fund to pay the 10*l.* and 20*l.*, made payable by the 1 & 2 *Will.* 4, c. 56, ss. 46 and 55, the bankrupt having obtained his certificate, and an affidavit being made of there being no probability that any creditor would come in and prove. *Ex parte Teague*, 140.

8. Where under a fiat, sued out by the bankrupt himself, three meetings had been advertised for the choice of assignees, but none had been chosen; and at the last of the meetings the choice was adjourned *sine die*,—*Held*, that the bill of costs of the bankrupt's solicitor, amounting to 36*l.* 1*s.* 6*d.*, was payable out of the assets in hand, amounting to 37*l.* 11*s.* 7*d.* after payment of the messenger's costs (the official assignee waiving remuneration), without any reservation being made in

respect of the office fees of 20*l.* and 10*l.* *Ex parte Patterson*, 158.

*See COSTS*, 4, 5; *SOLICITOR*, 5.

#### OFFICIAL ASSIGNEE.

1. Where, by mistake, one of the debts proved was omitted in the dividend list, and the fund was distributed,—*Held*, that the official assignee and the solicitor to the fiat were personally liable to pay the creditor the amount which he would have received had his debt been inserted in the list. *Ex parte Hall*, 555.

2. In the case of a defaulting official assignee, the Court ordered that no sum should be paid in respect of monies due to him in any bankruptcy, until he had made good all the amounts due from him in other bankruptcies. *Ex parte Graham*, 321.

*See OFFICE FEES*, 5.

#### OPENING BIDDINGS.

A mortgagee of West India estates, sold under a fiat, had obtained an order to bid, and was the only bidder for them. They were sold subject to other large incumbrances, the particulars of which were not at the time fully ascertained. On a petition to open the biddings, offering more than twice the amount, at which the equity of redemption had been knocked down, and payment of the former bidder's costs,—*Held* a proper case for such an order, upon terms similar to those adopted in Chancery.

*Quære*, whether the practice in Chancery generally, as to opening biddings, ought to be adopted in bankruptcy. *Ex parte Lee*, 628.

#### ORDER.

1. Where such an order recites the petition on which it is made, and refers to a printed paper as being set out in the schedule to the petition, and then recites that the schedule to the petition is in the words and

figures following, and sets out the printed paper, and then orders the party to be committed for his contempt in printing and publishing the aforesaid printed paper so set out as aforesaid in the said schedule to the said petition,—*quære*, whether the order contains a sufficient adjudication that a contempt has been committed?

The circulation of a libel on a Court, relating to a matter disposed of by an order still in minutes, is a contempt for which the Court may commit. *Ex parte Van Sandau*, 55.

See COMMITMENT, 2, 3.

#### PAROL.

See STATUTE OF FRAUDS.

#### PARTICULARS OF DEMAND.

An affidavit of debt filed as the foundation of an act of bankruptcy, stated the demand to be for goods sold and delivered; but by the particulars of demand, the greater portion of the debt was stated merely as due on bills of exchange, which, however, it afterwards turned out, were given in respect of goods sold and delivered.—*Held*, that the proceeding was irregular, and an insufficient foundation for an act of bankruptcy.

The debtor, on being served with the summons, called on the creditor's solicitor, and saw his clerk, at whose instance the debtor signed a memorandum, promising to pay at a certain time, or that if he did not the creditor might proceed on the summons. The debtor was attended by no solicitor on his behalf, and was not aware of the irregularity in the proceedings.—*Held*, that neither the signature of the memorandum nor his failure to attend the summons, prevented his impeaching the regularity of the proceedings, but that the fiat ought to be annulled, with costs.

*Quære*, whether it can be made part of the order, that the creditor

should set off his debt against the costs, and whether any consideration of the lien of the debtor's solicitor would prevent such an order being made? *Ex parte Greenstock*, 230.

#### PARTIES.

See TRUSTEE, 1, 2.

#### PARTNERS.

1. One of two partners procured the discount of a promissory note of the firm, on an agreement for a mortgage of shares belonging to the firm in certain ships and their freight, and of the policies of insurance effected by the firm on the shares. A mortgage deed was prepared, purporting to be made by both partners, but was only executed by the one. At the time of the execution of the deed one of the ships was lost, but this fact was then not known to the parties.—*Held*, that the security was binding on the firm, notwithstanding the execution of the deed by one partner only, and passed the insurance money, although the deed was not registered according to the shipping acts.

*Quære*, whether insurance brokers have a lien on a policy effected by them for the general balance due from their principal? *Ex parte Bosanquet*, 432.

2. On a dissolution of partnership the retiring gives to the continuing partner a bond for a sum payable by instalments; and after one instalment is paid, it is agreed that the bond shall be cancelled on the obligor giving fresh bonds for sums amounting to the sum then due, such new bond being executed to obligees nominated by the retired partner. At the time of executing the new bonds, the obligor is under some degree of pecuniary pressure, but does not contemplate bankruptcy or insolvency. Afterwards he becomes bankrupt.—*Held*, that the new obligees were entitled to prove against his estate, and that the want

of any satisfaction of the dissolution of partnership, or of any change in the style of the firm, or of any consideration between the new and old obligees, or between the obligor and the new obligees, would make no difference. *Re Todd*, 87.

3. *R. M.*, who carries on business in partnership with *J. C.*, *J. P.* and *T. S.* as bankers, signs one of the notes of the bank in this form,—“I promise to pay, &c., for *J. C.*, *R. M.*, *J. P.*, and *T. S.* *R. M.*” On the firm becoming bankrupt—*Held*, that the holders could not prove on this note against the separate estate of *R. M.* *Re Clarke*, 153.

4. Three partners of a firm of six carried on a distinct trade in partnership, and indorsed a promissory note made by the six, which was discounted by a person who believed at the time, from general reputation, that the three were partners in the aggregate firm, but that the firms were distinct.—*Held*, not a case for double proof; and *semble*, that, according to the principle of *Ex parte Moulton*, the same decision would have been given independent of the discounteer's belief as to the composition of the firms. *Ex parte Hinton*, 550.

5. Two partners trade under the name of one of them only, and upon a dissolution that one continues the business, the other retiring; but no apparent change takes place in the firm. By the agreement on the dissolution the stock in trade belongs to the continuing partner, who afterwards becomes bankrupt. The stock in trade is sold by his assignees, as his separate property, and the retired partner, though cognizant of the fact, makes no objection or claim on the retired partner becoming bankrupt.—*Held*, that the stock in trade was not in the reputed ownership of the two, but ought to be administered as the separate estate of the continuing partner. *Ex parte Wood*, 134.

6. Where a partner gives a separate security for a joint debt, and

becomes bankrupt, the other partners remaining solvent, the creditors may have, under the separate fiat, the usual order for sale, but can only have liberty to prove for the deficiency against the joint estate. *Ex parte The Leicestershire Banking Co.*, 292.

7. A wine merchant, carrying on business under the firm of *J. R. & Co.*, announced by a circular that he had taken his nephew into partnership. The business was thenceforth carried on under the style of *J. R. Son & Co.*, but as between the uncle and nephew, the latter received a salary only, and did not participate in the capital profits or losses of the concern. On both becoming bankrupt—*Held*, that a creditor who supplied goods to the firm might prove against the separate estate of the uncle.

Part of the stock in trade consisted of wines in the docks, which the uncle, on announcing the partnership, directed the Dock Company to deliver to the order of the new firm.—*Held*, that these wines were in the reputed ownership of the two, and ought to be administered as joint estate.

Other property consisted of wines in the hands of a lien creditor of the uncle, and after the announcement of the partnership, some of the wines were withdrawn and replaced by others in the name of the new firm.—*Held*, that the possession of the lien creditor did not prevent the application of the 72nd section, but that those wines also should, subject to the lien, be administered as joint estate.

Where a large number of creditors had a right of election to prove against the joint or separate estate, and the estates were not so ascertained as to enable the creditors to elect, a temporary order was made that no larger dividend should be declared of the one than of the other estate. *Ex parte Arbouin*, 359.

*See* BREACH OF TRUST, 2, 3 ;  
PROOF, 5 ; STATUTE OF FRAUDS.

#### PAYMENT IN FULL.

*See* CLERK ; FRIENDLY SOCIETY, 1.

#### PETITION.

*See* ANNULING, 8 ; APPEAL, 1 ;  
TRUSTEE, 1, 2.

#### PETITIONING CREDITOR.

Public officer of a corporation permitted to make the docket affidavit, where the corporation is the petitioning creditor. *Ex parte Collins*, 381.

*See* OFFICE FEES, 6, 7 ; SOLICITOR, 5.

#### POLICY.

*See* REPUTED OWNERSHIP, 1.

#### POST OBIT.

*See* PROOF.

#### PRACTICE.

*See* APPEAL ; BANKRUPT, 3 ; COMMITMENT, 2 ; EVIDENCE, 1 ; PARTICULARS OF DEMAND ; TRUSTEE, 2.

#### PREFERENCE.

*See* FRAUDULENT PREFERENCE, 2.

#### PROCEDENDO.

A *procedendo* ordered to issue where a commission had been superseded three years previously by consent of the creditors, on the ground that the bankrupt had not disclosed the fact of his being entitled to shares in a waterworks company, his defence being that the shares were subject to a mortgage for more than their value, but which mortgage turned out to be invalid for want of notice to the company. *Ex parte Lawrence*, 269.

#### PROCEEDINGS.

Proceedings ordered to be delivered to the bankrupt's solicitor to be proved in a Chancery suit, the solicitor and his agents (who were solicitors of the Court) undertaking

to return them in a month. *Ex parte Jones*, 28.

#### PRODUCTION.

The right of assignees to inspect or take a copy of a title deed of the bankrupt's property in the hands of his solicitor, is no higher than the right of the bankrupt himself, and therefore where the assignees petitioned that the solicitor might produce or give an attested copy of such a document, on being paid only the portion of his costs relating thereto, and the costs of the production or copy, the petition was dismissed with costs. *Ex parte Underwood*, 190.

#### PROOF.

1. Where the condition of a post obit bond, given by way of antenuptial settlement, had been broken, proof was ordered to be admitted for the whole amount secured. *Ex parte Griffiths*, 597.

2. Where a bill of exchange was dishonoured by the acceptor, and actions were brought by the holder against the drawer as well as the acceptor, and the former became bankrupt, after judgment signed, and a reference to the master to see what was due, and to tax costs ; and afterwards the acceptor paid the amount due on the bill :—*Held*, that the owner could prove for the costs. *Ex parte Cocks*, 446.

3. Where a husband sued his wife in an Ecclesiastical Court for a divorce, on the ground of adultery, and before any monition of costs, taxation, or any bill of costs prorected, or any decree, order, or sentence, the husband became bankrupt, and discontinued the suit :—*Held*, that the wife's proctor might prove against the husband's estate for the amount of his bill of costs. The whole of the costs of executing a commission to examine witnesses sued previously to, but closed after

the act of bankruptcy, *held* to be proveable. *Ex parte Moore*, 173.

4. Mother of creditor of weak intellect permitted, on her application *ex parte*, to prove on his behalf. *Ex parte Oxtoby*, 453.

5. A testatrix bequeathed 3000*l.* to two trustees, upon trust to invest it in the funds or on real securities, or to lend it to the house of *H. & Co.*, by whatever firm the same might be called, at interest, with power to vary the securities for others of a like nature. The house of *H. & Co.* then consisted of the two trustees and two other partners. One of the trustees died, and successive changes took place in the firm, which ultimately consisted of the surviving trustee and a new partner, who had notice of the trust. At the death of the testatrix the then firm owed to her estate more than 3000*l.*, and that amount, less the legacy duty, was suffered to remain due from them at interest, and was on the successive changes of the firm carried over to the credit of the trustee as due from the new firm; and on the last change the surviving trustee took from his partner and himself a promissory note for the amount, payable six months after notice. On the firm becoming bankrupt—*Held*, that a breach of trust had been committed, and that there was a right of proof against each separate estate. *Ex parte Poulson*, 79.

See ASSIGNEES, 1; BILL OF EXCHANGE, 1; BREACH OF TRUST, 1, 2, 3; CONTINGENT DEBT, 1, 2; DIVIDEND; FIAT, 4; GUARANTEE; INJUNCTION; MORTGAGE, 3; PARTNERS, 2, 3, 4; SHARES; STOPPAGE IN TRANSITU, 1, 2; SURETY.

### PROTECTION.

A trader debtor being summoned, entered into a bond with sureties, conditioned for payment of the debt, or the surrender of the debtor in execution. The creditors re-

covered judgment, and a fiat was issued, at the instance of another creditor, against the debtor, who obtained his protection under it, and then surrendered in discharge of his sureties in the bond.—*Held*, that the protection did not entitle him to be released from the custody to which he had voluntarily surrendered himself. *Ex parte Oldaker*, 591.

### PUBLIC COMPANY.

1. Form of order in Chancery under the act 7 & 8 *Vict.* c. 110, s. 20, for winding up the affairs of a bankrupt Joint Stock Company. *Re The Forth Marine Insurance Company*, 335.

2. Form of order for director of company, become bankrupt under 7 & 8 *Vict.* c. 111, to surrender after time limited for that purpose. *Ex parte Barber*, 381.

3. Directors of a company ordered by the Commissioner to prepare the balance sheet, in pursuance of 7 & 8 *Vict.* c. 111, on the company being declared bankrupt under that act, may petition to annul the fiat without alleging that they are shareholders. On such a petition it is necessary to serve some party who may represent the directors and shareholders (if any) who desire the fiat to stand, although the company has been dissolved under 8 & 9 *Vict.* c. 28, for upwards of three months, and the fiat is sued out by parties in the character of creditors. The 7 & 8 *Vict.* c. 111, s. 4, providing that a copy of the declaration and minute therein mentioned shall be received as evidence, and that no further evidence shall be required of the act of bankruptcy mentioned in the clause, does not preclude a party disputing the bankruptcy from shewing that the declaration and the resolution were unauthorized by the subscribers' agreement.

A clause in the subscribers' agreement empowering the majority at any



meeting of not less than five directors to bind the rest and the company, does not authorize a meeting of three to do so, although they are unanimous and the other directors are summoned and fail to attend. *Ex parte Morrison*, 539.

*See* PETITIONING CREDITOR ; REPUTED OWNERSHIP, 3.

### PUBLIC POLICY.

*See* COMMISSIONER OF BANKRUPT, 1, 2 ; SHARES.

### REFUNDING.

*See* MORTGAGE, 2.

### REPUTED OWNERSHIP.

1. A mortgagee of a policy of assurance deposits it by way of sub-mortgage, and gives notice of the sub-mortgage to the insurance office, but not to the original mortgagor.—*Held*, that this was sufficient to take the policy out of the reputed ownership of the mortgagee.

A bond which is executed to secure the payment of bills of exchange, is mortgaged together with the bills which are endorsed. Afterwards the mortgagor deposits the bonds and the bills by way of sub-mortgage and becomes bankrupt, no notice of the submortgage having been given to the obligor.—*Held*, that the submortgage was good against the assignees.

Deposit by way of mortgage of a land order of the New Zealand Company.—*Held* to be good, without notice being given to the company of the deposit. *Ex parte Barnett*, 194.

2. Submortgages of shipments at Ceylon and Hong Kong, sent thither, directed to the parties in possession, notices of their security by the next direct mail, there being another and earlier mail by a different rout, by which the notices might possibly have sooner reached their destination ; before, however, this could have taken place, by either mode of transmission, the submort-

gages became bankrupt.—*Held*, that the notice was sufficient to take the goods out of their reputed ownership.

A man may give a valid security on merchandize at sea belonging to him, although at the time he is ignorant of the particulars of which it consists. *Ex parte Kelsall*, 352.

3. Shares in a waterworks company *held* subject to the law of reputed ownership, the company's act of parliament declaring them to be personal property. *Ex parte Lawrence*, 269.

4. Oil merchants give a lien on oil belonging to them in the hands of other persons to a creditor, who, trusting to an incorrect representation of the oil merchants, delays taking possession or giving notice of lien, and the merchants repossess themselves of the oil, mix it with their general stock and become bankrupt.—*Held*, that the lien was good, and that the oil was not in the order and disposition of the bankrupts with the consent of the true owner. *Ex parte Bell*, 577.

5. *Quære*, as to the effect of a joint possession of the servants of the bankrupt and of the owner of goods as to reputed ownership ? *Ex parte Majoribanks*, 466.

*See* COMPOSITION DEED, 3 ; PARTNERS, 5, 7.

### SALE.

*See* OPENING BIDDINGS.

### SECURITY.

*See* REPUTED OWNERSHIP, 2.

### SEPARATE DEBT.

*See* STATUTE OF FRAUDS.

### SEPARATE ESTATE.

*See* PARTNERS, 3, 5, 6, 7 ; PROOF, 5.

### SERVICE.

*See* COSTS, 4.

### SET OFF.

*See* LIEN ; PARTICULARS OF DEMAND.

## SETTLEMENT.

See COVENANT.

## SHARES.

A purchase by brokers in pursuance of the order of a customer of shares in a projected railway company provisionally registered—*Held* not illegal but a sufficient ground for the admission of a proof tendered by the brokers for the loss occasioned by the non-completion of the purchase by the customer. *Ex parte Barton*, 316.

See REPUTED OWNERSHIP, 3.

## SINE DIE.

See BANKRUPT, 1.

## SOLICITOR.

1. Under particular circumstances solicitor to the fiat permitted to purchase part of the bankrupt's estate. *Ex parte Watts*, 265.

2. It is not correct or according to the course of the Court for the assignees to employ as their solicitor the partner of one of them who is a solicitor, and when this appeared to be the case the Court directed the circumstances to be intimated to the Commissioner. *Ex parte Downes*, 390.

3. Where the solicitor to the fiat received and paid all monies on account of the estate, and at the audit the accounts were verified by his affidavit as to their accuracy, and the affidavit of the assignees that they had neither received nor paid anything except what had been so received and paid by the solicitor; but there was nothing to shew that either of the assignees had either, as to information or belief, verified the accuracy of the accounts:—*Held*, that the accounts ought to be opened and retaken although three years had passed since the audit.

The retainer by the solicitor under such circumstances of the amount of his bill of costs as taxed by the

Commissioner, and the allowance of such retainer at the audit—*Held* no such payment of the bill as to preclude retaxation.

Whether the Commissioner has jurisdiction to open accounts audited and passed by Commissioners under the old jurisdiction, *quære*. *Ex parte Rees*, 205.

4. Where the assets had been sold by the assignee on credit, and part only of the purchase money was paid, which was applied in part payment of the bill of costs of the solicitor to the commission, and after a lapse of several years the assignee was ordered to make good the remainder of the purchase money out of his own pocket—*Held*, that out of this money so made good the solicitor was entitled to be paid the remainder of his bill, although it was recovered without his assistance, and although more than six years had elapsed since the date of the most recent item in the bill. *Ex parte Brutton*, 116.

5. *Quære*, whether the bill of costs of the solicitor of the petitioning creditor is payable, without receiving sufficient to pay the office fees of 10*l.* and 20*l.* payable in the event of assignees being chosen, no creditor having proved, and the bankrupt having obtained his certificate. *Ex parte Hembery*, 442.

6. *Semble*, that it must be a grave cause of complaint against an attorney of the Court, to induce the Court to interfere summarily against him, for conduct not relating to a matter within the jurisdiction of the Court. *Ex parte Shuckhard*, 454.

7. Where a country solicitor, admitted as a solicitor of the Court of Review, had, under a mistaken notion, taken an affidavit of debt (as a master extraordinary in Chancery) to serve as the foundation of an act of bankruptcy, and appeared upon a petition to annul the fiat, and submitted to the jurisdiction of the Court, he was ordered to pay the

costs of annulling the fiat. *Ex parte Benbow*, 443.

See COSTS, 3, 4, 5; OFFICE FEES, 7, 8; OFFICIAL ASSIGNEE, 1; PARTICULARS OF DEMAND; PRODUCTION.

### STATUTE OF FRAUDS.

A parol agreement is sufficient to convert a separate into a joint debt—such an agreement not being “a promise to answer the debt of another” within the Statute of Frauds, but the creation of a new debt in consideration of the former being extinguished. *Ex parte Lane*, 300.

### STOPPAGE IN TRANSITU.

1. A vendor of cotton in America, by direction of the purchasers in England, ships the cotton on board a vessel belonging to the latter, who became bankrupt before its arrival. A mortgagee of the ship, who happens to be an agent of the vendor, takes possession of the ship under his mortgage, and sells the cotton under a supposed right on the part of his principal to stop it *in transitu*, and the principal sanctions the transaction as between himself and the agent, by accepting a credit in account for the proceeds of the cotton. The assignees of the purchasers then bring an action against the mortgagee for this seizure, and he pays them under a compromise the amount for which the cotton sold.—*Held*, that under the circumstances the contract was not rescinded by the seizure of the cotton, but that the vendor was entitled to prove for the purchase money. *Re Humberston*, 262.

2. A vendor of cotton in America, by direction of the purchasers in England, ships the cotton on board a vessel belonging to the latter.

The purchasers become bankrupt, and afterwards the vessel arrives in England, and is taken possession of by a mortgagee in right of his mortgage. The mortgagee happens to

be a partner in a firm who are the agents of the vendor, and, upon a notice from them claiming a right to stop the cotton *in transitu*, he permits them to take possession of it. They sell it at a loss, and give their principal credit in his account for the proceeds. The vendor becomes bankrupt. An action of trover for the cotton is commenced against the mortgagee by the purchasers' assignees, and is compromised upon the terms of the purchasers' assignees proving against the estate of the vendor for the amount of the proceeds, for the benefit of the mortgagee; the latter agreeing, in the event of no dividend being paid by a certain day, that judgment for the full amount of the proceeds should be entered up against him in the action. Proof is made accordingly, but no dividend paid, and the mortgagee pays the full amount of the proceeds of the sale to the purchasers' assignees. The vendor's assignees then tender a proof for the original price of the cotton against the estate of the purchasers.—*Held*, that the proof ought to be admitted for the full amount. *Ex parte Molyneux*, 121.

### SUMMONS.

See PARTICULARS OF DEMAND.

### SURETY.

A bond was entered into by a principal and three sureties. The principal, and one of the sureties, compounded with their creditors, and the other two sureties became bankrupt. The obligee proved the full amount of his debt against the separate estates of the two bankrupts, and claimed under the compositions; and by these means received 20s. in the pound, but the estate of the compounding surety paid more than its contributive share.—*Held*, that that estate was entitled to the benefit of the proof made by the obligee against the

## FIAT.

1. Where one of the bankrupts died before the adjudication under a joint fiat, the fiat was ordered to be amended by omitting his name. *Ex parte Hall*, 332.

2. Description of a bankrupt as of a particular parish in a particular county, *held* sufficient, although the parish was partly in that county and partly in another, and the bankrupt's shop was in the other, the affidavit being produced of there being no other person of the same name and trade in the parish. *Re Woodhead*, 99.

3. A bankrupt's usual place of business for two years before the bankruptcy had been at Hounslow, but he had taken for his family a house at Durdham Down, near Bristol, where he had resided for some months previous to his bankruptcy, and contracted debts. A Bristol fiat, describing him as of Durdham Down and naming him *Clarke* instead of *Clark*, was transferred to the London Court, to which a fiat with a correct description had been issued, and the proofs were ordered to be transferred, the Bristol fiat being impounded. *Ex parte Burbidge*, 256.

4. At the sitting for opening the fiat it appeared that for securing the petitioning creditor's debt, the trader against whom the fiat was issued gave him a promissory note, which there were grounds for believing was forged. No prosecution having been instituted, the Commissioner declined proceeding with the fiat. On the petition of the petitioning creditor the Court ordered the fiat to be transferred to another Commissioner and proceeded with. *Ex parte Hind*, 161.

*See* ANNULING, 7, 8; OFFICE FEES, 4; PROCEDENDO; VENUE.

## FIXTURES.

*See* MORTGAGE, 1.

## FORGERY.

*See* FIAT, 4.

## FRAUD.

*See* NOTICE; STATUTE OF FRAUDS.

## FRAUDULENT DEED.

*See* COMPOSITION DEED, 2, 3, 4.

## FRAUDULENT PREFERENCE.

1. A trader being indebted to his bankers gave them a receipt for 1000*l.* purporting to be in full for the purchase of the furniture, plate, wines and effects in his house; but no possession was given of the goods till a year afterwards, when the trader's solicitor applied to the bankers on his behalf for a loan of 10,000*l.*, stating that a creditor of the trader would obtain judgment, on which he could issue execution, but that if this creditor refused to give the trader time, the bankrupt would protect himself and his other creditors. The day after this communication, and in consequence of it, the bankers sent a man to take possession, which was delivered to him by the trader, who on the same day filed a declaration of insolvency, and sued out a fiat against himself.—*Held*, that the delivery of possession was not a fraudulent preference. *Ex parte Majoribanks*, 466.

2. Payment of a debt by cheque may be a fraudulent preference.

Where such payment was made without pressure after a resolution had been come to by the debtors to suspend payment of their debts generally, it was held under the circumstances of the case a fraudulent preference, whether the debtors contemplated actual bankruptcy or not. *Ex parte Simpson*, 9.

*See* ANNULING, 1; PARTNERS, 2.

## FRIENDLY SOCIETY.

The rules of a Friendly Society provided that the treasurer retaining upwards of 10*l.* more than seven

days after he was required to pay it over, should be excluded from the society. They also provided that a particular firm should be the bankers of the society, with power for a general meeting to appoint other bankers.—*Held*, that the bankers for the time being were not officers so as upon their bankruptcy to entitle the society to payment in full. *Ex parte Harris*, 162.

#### GUARANTEE.

In a continuing limited guarantee there was a proviso that if the creditors received a dividend from any estate of the principal debtor, it should not be taken in discharge of the guarantee, but that the creditor should be entitled to recover on the guarantee to the full extent of the limit, notwithstanding on the bankruptcy of the principal debtors the creditors proved, and before receiving any dividend obtained payment from the guarantors to the full extent of the limit.—*Held*, that the guarantors were not entitled to stand in the place of the creditors as to so much of the proof as was equal to their payment. *Ex parte Miles*, 623.

#### HUSBAND AND WIFE.

*See* PROOF, 3.

#### INJUNCTION.

A creditor who has proved, restrained from proceeding for the same demand in the County Court, although there is no dividend. *Ex parte Flower*, 503.

*See* ASSIGNEES, 3; COMMITMENT, 3; JURISDICTION, 2, 3.

#### ILLEGAL DEBT.

*See* SHARES.

#### INSOLVENCY.

*See* JURISDICTION, 4.

#### INSOLVENT DEBTORS ACT.

*See* ANNULLING, 5.

#### INSURANCE.

*See* PARTNERS, 1.

#### JOINT DEBT.

*See* STATUTE OF FRAUDS.

#### JOINT ESTATE.

*See* PARTNERS, 3, 5, 6, 7; PROOF, 5.

#### JOINT AND SEPARATE ESTATE.

*See* PARTNERS, 3, 5, 6, 7; PROOF, 5.

#### JURISDICTION.

1. *Quære*, whether a commitment by the Court of Review for contempt can be the subject of an appeal. *Ex parte Van Sandau*, 55.

2. One judge of the Court of Review, sitting as the Court, may commit for contempt.

In an action for the imprisonment under the commitment, the order is pleaded and the plaintiff demurs.—*Held*, that an injunction ought not to issue, limiting the plaintiff as to the particulars, in respect of which he might, on such demurer, question the validity of the order. *Ex parte Van Sandau*, 55.

3. The Court of Review has jurisdiction to restrain a party committed by it for contempt, from questioning in an action at law the regularity, propriety, or form of the order of committal. *Ex parte Turner*, 30.

4. On an application by an insolvent for a final order, under 7 & 8 Vict. c. 96, s. 6, the Commissioner remanded the insolvent (who had previously been discharged under the act), on the ground of his having recently petitioned the Insolvent Debtors Court, and that proceedings were pending there.—*Held*, that there was no appeal to the Court of Review from this order. *Ex parte Newlands*, 150.

*See* APPEAL; PRODUCTION.

## LIEN.

A debt due from a devisee to a testator does not constitute any lien upon the devised estate. *Ex parte Barff*, 613.

See COVENANT; NOTICE; PARTICULARS OF DEMAND; PARTNERS, 1; PRODUCTION; REPUTED OWNERSHIP, 2, 4.

## LIMITATIONS.

See SOLICITOR, 4.

## LUNATIC.

See ACT OF BANKRUPTCY, 2; PROOF, 4.

## MARKET GARDENER.

See TRADING, 2.

## MARSHALLING.

A landlord distrained upon goods of his tenant, and sold part of them, which were subject to a mortgage. The tenant became bankrupt. — *Held*, that the mortgagee was entitled to stand in the place of the landlord, and to be paid the amount of his mortgage debt out of the proceeds of the goods taken under the distress, which were not comprised in his security. *Ex parte Stephenson*, 586.

## MASTER.

See SOLICITOR, 7.

## MEMORANDUM.

See MORTGAGE, 7.

## MISTAKE.

See MORTGAGE, 2.

## MORTGAGE.

1. A lessee annexed tenant's fixtures, and then deposited the lease, by way of mortgage, with a memorandum, not noticing the fixtures. — *Held*, on his becoming bankrupt, that the security extended to the fixtures. *Ex parte Tagart*, 531.

2. When all parties acted under an impression that a security was

for the whole amount of a debt, and twenty-one years had elapsed since the security was given, but no evidence could be produced of any contract, except one for security to a limited amount, which was exceeded by the amount received by the creditor upon his security: — *Held*, that the creditor ought not to be called upon to refund. *Ex parte Follett*, 212.

3. Where a legal mortgagee had obtained the Commissioner's order for sale of the property comprised in the security, and part of the property had been sold, and the proceeds applied in reduction of the debt, and the remainder of the property proved unsaleable, the mortgagee was permitted to give up the unsold property, and prove for the unpaid portion of his debt. *Ex parte Greaves*, 119.

4. Form of order on petition of equitable submortgagee. *Ex parte Powell*, 405.

5. Form of order upon a petition of an equitable mortgagee, who was sole creditor's assignee. *Ex parte Young*, 146.

6. Where, upon an equitable mortgagee's petition the mortgagee and the creditors' assignees appeared by the same solicitor, the Court ordered the sale to be conducted as the Commissioner should think fit, having regard to this circumstance; and the official assignee was allowed his costs of appearing separately. *Ex parte Bromage*, 375.

7. A trader deposits policies of assurance with his bankers to secure the floating balance due from him, and signs a memorandum of the object of the deposit, of which notice is given to the insurance office; afterwards he takes a partner, and the policies remain, and are treated as a security for the floating balance due from the firm, but of this change in the object of the security no memorandum is signed, nor is any notice given to the office. On the firm

becoming bankrupt—*Held*, that the bankers were entitled to the usual order, as in the case of an equitable mortgagee without a written memorandum. *Ex parte Barnett*, 194.

See MARSHALLING; NOTICE; REPUTED OWNERSHIP, 1, 2, 4.

### NOTICE.

The owner of a public house agreed to grant a lease of it, at a premium. The intended lessee deposited the agreement with *M. & Co.*, brewers, to secure repayment of an advance. The lease was executed, and was deposited by the lessee with the landlord's solicitor, to secure the premium. The lessee obtained it from them for the purpose, as he alleged, of producing it to the magistrates, to enable him to procure a licence. He undertook to return it forthwith; but instead of doing so, he instructed an auctioneer to obtain an advance upon it from other brewers, *R. & Co.* The auctioneer produced to *R. & Co.*'s agent an order from the lessee for the delivery of the lease to *R. & Co.*, noticing that the advance was for the purpose of enabling the lessee to pay *M. & Co.* The agent objected to recognise this memorandum, and inquired whether the lessee owed anything to *M. & Co.* He was informed by the auctioneer and the lessee that there was nothing due to *M. & Co.*, except for goods supplied. He had previously obtained from the lessee himself an order for the delivery of the lease, not mentioning *M. & Co.* at all; and he obtained the lease on delivering the order. *R. & Co.* advanced money on the deposit. On the lessee becoming bankrupt—*Held*, that the security of *R. & Co.* must be postponed to those of the landlord, and of *M. & Co.*, although there had been a demise of the legal estate on trusts, extending to the debt of *R. & Co.*, and not to the prior equities. *Ex parte Reid*, 600.

See REPUTED OWNERSHIP, 1, 2.

### OFFICE FEES.

1. On a petition to annul a fiat, with consent of creditors, the Commissioner declined to certify the consent without payment of the office fees of 10*l.* and 20*l.* Assignees had been chosen, but it was stated that there were not, and were not likely to be, any assets. The Court requested the Commissioner to certify his opinion whether there were any available assets. *Ex parte Davis*, 267.

2. Where a bankrupt sued out a fiat against himself, which was annulled, and no creditors' assignees had been chosen, the office fees of 20*l.* and 10*l.* paid by him into the bank were ordered to be returned. *Ex parte Reynolds*, 373.

3. Where a bankrupt sued out a fiat against himself, and only one creditor proved, and assignees were chosen; but there were no assets, and the office fees of 10*l.* and 20*l.* had not been paid, the Court refused to dispense with the usual certificate of the Commissioner, on an application to annul with the consent of the creditor. *Ex parte Nicholls*, 331.

4. On a petition of the bankrupt, with the consent of all the creditors, who had proved to annul the fiat, the Commissioner refused to sign the requisite certificate, unless the fees of 20*l.* and 10*l.*, payable under 1 & 2 *Will.* 4, c. 56, ss. 46 and 55, were paid. There were no assets. The fiat was ordered to be annulled, on the registrar being satisfied of the concurrence of the creditor. *Ex parte Diamond*, 143.

5. A meeting and an adjourned meeting are held for the choice of assignees, but none are chosen.—*Held*, that the payment of 1*l.*, directed by 1 & 2 *Will.* 4, c. 56, s. 53, to be made for every sitting other than any sitting for the choice of assignees, &c., was not due on either of the above sittings.

On the bankrupt petitioning to

annul the fiat, with the consent of the creditors, and the Commissioners refusing to sign the usual certificate until the above fees, and the fees of 20*l.* and 10*l.*, payable under the same act (ss. 46 and 55), were paid,—*Held*, that the fiat ought to be annulled, on payment, out of the fund realised, of the expenses, and a proper remuneration of the official assignee, to be ascertained by the Commissioner. *Ex parte Miller*, 144.

6. Where the sums of 20*l.* and 10*l.*, directed to be paid by 1 & 2 *Will.* 4, c. 56, ss. 46 and 50, had been paid out of an estate which was insufficient to pay those sums, and the petitioning creditors' costs up to the choice, the Lord Chancellor refused to order the payments to be refunded to the petitioning creditors. *Ex parte Hopkins*, 204.

7. Where an official assignee had been appointed, but although three meetings had been advertised for the choice of assignees, no creditor attended, and the bankrupt passed his last examination,—*Held*, that the bill of the solicitor to the petitioning creditor was payable out of the assets realised, although there would not then remain any fund to pay the 10*l.* and 20*l.*, made payable by the 1 & 2 *Will.* 4, c. 56, ss. 46 and 55, the bankrupt having obtained his certificate, and an affidavit being made of there being no probability that any creditor would come in and prove. *Ex parte Teague*, 140.

8. Where under a fiat, sued out by the bankrupt himself, three meetings had been advertised for the choice of assignees, but none had been chosen; and at the last of the meetings the choice was adjourned *sine die*,—*Held*, that the bill of costs of the bankrupt's solicitor, amounting to 36*l.* 1*s.* 6*d.*, was payable out of the assets in hand, amounting to 37*l.* 11*s.* 7*d.* after payment of the messenger's costs (the official assignee waiving remuneration), without any reservation being made in

respect of the office fees of 20*l.* and 10*l.* *Ex parte Patterson*, 158.

*See COSTS*, 4, 5; *SOLICITOR*, 5.

#### OFFICIAL ASSIGNEE.

1. Where, by mistake, one of the debts proved was omitted in the dividend list, and the fund was distributed,—*Held*, that the official assignee and the solicitor to the fiat were personally liable to pay the creditor the amount which he would have received had his debt been inserted in the list. *Ex parte Hall*, 555.

2. In the case of a defaulting official assignee, the Court ordered that no sum should be paid in respect of monies due to him in any bankruptcy, until he had made good all the amounts due from him in other bankruptcies. *Ex parte Graham*, 321.

*See OFFICE FEES*, 5.

#### OPENING BIDDINGS.

A mortgagee of West India estates, sold under a fiat, had obtained an order to bid, and was the only bidder for them. They were sold subject to other large incumbrances, the particulars of which were not at the time fully ascertained. On a petition to open the biddings, offering more than twice the amount, at which the equity of redemption had been knocked down, and payment of the former bidder's costs,—*Held* a proper case for such an order, upon terms similar to those adopted in Chancery.

*Quære*, whether the practice in Chancery generally, as to opening biddings, ought to be adopted in bankruptcy. *Ex parte Lee*, 628.

#### ORDER.

1. Where such an order recites the petition on which it is made, and refers to a printed paper as being set out in the schedule to the petition, and then recites that the schedule to the petition is in the words and



figures following, and sets out the printed paper, and then orders the party to be committed for his contempt in printing and publishing the aforesaid printed paper so set out as aforesaid in the said schedule to the said petition,—*quære*, whether the order contains a sufficient adjudication that a contempt has been committed?

The circulation of a libel on a Court, relating to a matter disposed of by an order still in minutes, is a contempt for which the Court may commit. *Ex parte Van Sandau*, 55.

See COMMITMENT, 2, 3.

### PAROL.

See STATUTE OF FRAUDS.

### PARTICULARS OF DEMAND.

An affidavit of debt filed as the foundation of an act of bankruptcy, stated the demand to be for goods sold and delivered; but by the particulars of demand, the greater portion of the debt was stated merely as due on bills of exchange, which, however, it afterwards turned out, were given in respect of goods sold and delivered.—*Held*, that the proceeding was irregular, and an insufficient foundation for an act of bankruptcy.

The debtor, on being served with the summons, called on the creditor's solicitor, and saw his clerk, at whose instance the debtor signed a memorandum, promising to pay at a certain time, or that if he did not the creditor might proceed on the summons. The debtor was attended by no solicitor on his behalf, and was not aware of the irregularity in the proceedings.—*Held*, that neither the signature of the memorandum nor his failure to attend the summons, prevented his impeaching the regularity of the proceedings, but that the fiat ought to be annulled, with costs.

*Quære*, whether it can be made part of the order, that the creditor

should set off his debt against the costs, and whether any consideration of the lien of the debtor's solicitor would prevent such an order being made? *Ex parte Greenstock*, 230.

### PARTIES.

See TRUSTEE, 1, 2.

### PARTNERS.

1. One of two partners procured the discount of a promissory note of the firm, on an agreement for a mortgage of shares belonging to the firm in certain ships and their freight, and of the policies of insurance effected by the firm on the shares. A mortgage deed was prepared, purporting to be made by both partners, but was only executed by the one. At the time of the execution of the deed one of the ships was lost, but this fact was then not known to the parties.—*Held*, that the security was binding on the firm, notwithstanding the execution of the deed by one partner only, and passed the insurance money, although the deed was not registered according to the shipping acts.

*Quære*, whether insurance brokers have a lien on a policy effected by them for the general balance due from their principal? *Ex parte Bosanquet*, 432.

2. On a dissolution of partnership the retiring gives to the continuing partner a bond for a sum payable by instalments; and after one instalment is paid, it is agreed that the bond shall be cancelled on the obligor giving fresh bonds for sums amounting to the sum then due, such new bond being executed to obligees nominated by the retired partner. At the time of executing the new bonds, the obligor is under some degree of pecuniary pressure, but does not contemplate bankruptcy or insolvency. Afterwards he becomes bankrupt.—*Held*, that the new obligees were entitled to prove against his estate, and that the want

of any satisfaction of the dissolution of partnership, or of any change in the style of the firm, or of any consideration between the new and old obligees, or between the obligor and the new obligees, would make no difference. *Re Todd*, 87.

3. *R. M.*, who carries on business in partnership with *J. C.*, *J. P.* and *T. S.* as bankers, signs one of the notes of the bank in this form,—“I promise to pay, &c., for *J. C.*, *R. M.*, *J. P.*, and *T. S.* *R. M.*” On the firm becoming bankrupt—*Held*, that the holders could not prove on this note against the separate estate of *R. M.* *Re Clarke*, 153.

4. Three partners of a firm of six carried on a distinct trade in partnership, and indorsed a promissory note made by the six, which was discounted by a person who believed at the time, from general reputation, that the three were partners in the aggregate firm, but that the firms were distinct.—*Held*, not a case for double proof; and *semble*, that, according to the principle of *Ex parte Moulton*, the same decision would have been given independent of the discounter's belief as to the composition of the firms. *Ex parte Hinton*, 550.

5. Two partners trade under the name of one of them only, and upon a dissolution that one continues the business, the other retiring; but no apparent change takes place in the firm. By the agreement on the dissolution the stock in trade belongs to the continuing partner, who afterwards becomes bankrupt. The stock in trade is sold by his assignees, as his separate property, and the retired partner, though cognizant of the fact, makes *no objection or claim* on the retired partner becoming bankrupt.—*Held*, that the stock in trade was not in the reputed ownership of the two, but ought to be administered as the separate estate of the continuing partner. *Ex parte Wood*, 134.

6. Where a partner gives a separate security for a joint debt, and

becomes bankrupt, the other partners remaining solvent, the creditors may have, under the separate fiat, the usual order for sale, but can only have liberty to prove for the deficiency against the joint estate. *Ex parte The Leicestershire Banking Co.*, 292.

7. A wine merchant, carrying on business under the firm of *J. R. & Co.*, announced by a circular that he had taken his nephew into partnership. The business was thenceforth carried on under the style of *J. R. Son & Co.*, but as between the uncle and nephew, the latter received a salary only, and did not participate in the capital profits or losses of the concern. On both becoming bankrupt—*Held*, that a creditor who supplied goods to the firm might prove against the separate estate of the uncle.

Part of the stock in trade consisted of wines in the docks, which the uncle, on announcing the partnership, directed the Dock Company to deliver to the order of the new firm.—*Held*, that these wines were in the reputed ownership of the two, and ought to be administered as joint estate.

Other property consisted of wines in the hands of a lien creditor of the uncle, and after the announcement of the partnership, some of the wines were withdrawn and replaced by others in the name of the new firm.—*Held*, that the possession of the lien creditor did not prevent the application of the 72nd section, but that those wines also should, subject to the lien, be administered as joint estate.

Where a large number of creditors had a right of election to prove against the joint or separate estate, and the estates were not so ascertained as to enable the creditors to elect, a temporary order was made that no larger dividend should be declared of the one than of the other estate. *Ex parte Arbouin*, 359.

*See* BREACH OF TRUST, 2, 3 ;  
PROOF, 5 ; STATUTE OF FRAUDS.

#### PAYMENT IN FULL.

*See* CLERK ; FRIENDLY SOCIETY, 1.

#### PETITION.

*See* ANNULING, 8 ; APPEAL, 1 ;  
TRUSTEE, 1, 2.

#### PETITIONING CREDITOR.

Public officer of a corporation permitted to make the docket affidavit, where the corporation is the petitioning creditor. *Ex parte Collins*, 381.

*See* OFFICE FEES, 6, 7 ; SOLICITOR, 5.

#### POLICY.

*See* REPUTED OWNERSHIP, 1.

#### POST OBIT.

*See* PROOF.

#### PRACTICE.

*See* APPEAL ; BANKRUPT, 3 ; COMMITMENT, 2 ; EVIDENCE, 1 ; PARTICULARS OF DEMAND ; TRUSTEE, 2.

#### PREFERENCE.

*See* FRAUDULENT PREFERENCE, 2.

#### PROCEDENDO.

A *procedendo* ordered to issue where a commission had been superseded three years previously by consent of the creditors, on the ground that the bankrupt had not disclosed the fact of his being entitled to shares in a waterworks company, his defence being that the shares were subject to a mortgage for more than their value, but which mortgage turned out to be invalid for want of notice to the company. *Ex parte Lawrence*, 269.

#### PROCEEDINGS.

Proceedings ordered to be delivered to the bankrupt's solicitor to be proved in a Chancery suit, the solicitor and his agents (who were solicitors of the Court) undertaking

to return them in a month. *Ex parte Jones*, 28.

#### PRODUCTION.

The right of assignees to inspect or take a copy of a title deed of the bankrupt's property in the hands of his solicitor, is no higher than the right of the bankrupt himself, and therefore where the assignees petitioned that the solicitor might produce or give an attested copy of such a document, on being paid only the portion of his costs relating thereto, and the costs of the production or copy, the petition was dismissed with costs. *Ex parte Underwood*, 190.

#### PROOF.

1. Where the condition of a post obit bond, given by way of antenuptial settlement, had been broken, proof was ordered to be admitted for the whole amount secured. *Ex parte Griffiths*, 597.

2. Where a bill of exchange was dishonoured by the acceptor, and actions were brought by the holder against the drawer as well as the acceptor, and the former became bankrupt, after judgment signed, and a reference to the master to see what was due, and to tax costs ; and afterwards the acceptor paid the amount due on the bill :—*Held*, that the owner could prove for the costs. *Ex parte Cocks*, 446.

3. Where a husband sued his wife in an Ecclesiastical Court for a divorce, on the ground of adultery, and before any monition of costs, taxation, or any bill of costs proffered, or any decree, order, or sentence, the husband became bankrupt, and discontinued the suit :—*Held*, that the wife's proctor might prove against the husband's estate for the amount of his bill of costs. The whole of the costs of executing a commission to examine witnesses sued previously to, but closed after

the act of bankruptcy, *held* to be proveable. *Ex parte Moore*, 173.

4. Mother of creditor of weak intellect permitted, on her application *ex parte*, to prove on his behalf. *Ex parte Oxtoby*, 453.

5. A testatrix bequeathed 3000*l.* to two trustees, upon trust to invest it in the funds or on real securities, or to lend it to the house of *H. & Co.*, by whatever firm the same might be called, at interest, with power to vary the securities for others of a like nature. The house of *H. & Co.* then consisted of the two trustees and two other partners. One of the trustees died, and successive changes took place in the firm, which ultimately consisted of the surviving trustee and a new partner, who had notice of the trust. At the death of the testatrix the then firm owed to her estate more than 3000*l.*, and that amount, less the legacy duty, was suffered to remain due from them at interest, and was on the successive changes of the firm carried over to the credit of the trustee as due from the new firm; and on the last change the surviving trustee took from his partner and himself a promissory note for the amount, payable six months after notice. On the firm becoming bankrupt—*Held*, that a breach of trust had been committed, and that there was a right of proof against each separate estate. *Ex parte Poulson*, 79.

See ASSIGNEES, 1; BILL OF EXCHANGE, 1; BREACH OF TRUST, 1, 2, 3; CONTINGENT DEBT, 1, 2; DIVIDEND; FIAT, 4; GUARANTEE; INJUNCTION; MORTGAGE, 3; PARTNERS, 2, 3, 4; SHARES; STOPPAGE IN TRANSITU, 1, 2; SURETY.

### PROTECTION.

A trader debtor being summoned, entered into a bond with sureties, conditioned for payment of the debt, or the surrender of the debtor in execution. The creditors re-

covered judgment, and a fiat was issued, at the instance of another creditor, against the debtor, who obtained his protection under it, and then surrendered in discharge of his sureties in the bond.—*Held*, that the protection did not entitle him to be released from the custody to which he had voluntarily surrendered himself. *Ex parte Oldaker*, 591.

### PUBLIC COMPANY.

1. Form of order in Chancery under the act 7 & 8 *Vict.* c. 110, s. 20, for winding up the affairs of a bankrupt Joint Stock Company. *Re The Forth Marine Insurance Company*, 335.

2. Form of order for director of company, become bankrupt under 7 & 8 *Vict.* c. 111, to surrender after time limited for that purpose. *Ex parte Barber*, 381.

3. Directors of a company ordered by the Commissioner to prepare the balance sheet, in pursuance of 7 & 8 *Vict.* c. 111, on the company being declared bankrupt under that act, may petition to annul the fiat without alleging that they are shareholders. On such a petition it is necessary to serve some party who may represent the directors and shareholders (if any) who desire the fiat to stand, although the company has been dissolved under 8 & 9 *Vict.* c. 28, for upwards of three months, and the fiat is sued out by parties in the character of creditors. The 7 & 8 *Vict.* c. 111, s. 4, providing that a copy of the declaration and minute therein mentioned shall be received as evidence, and that no further evidence shall be required of the act of bankruptcy mentioned in the clause, does not preclude a party disputing the bankruptcy from shewing that the declaration and the resolution were unauthorized by the subscribers' agreement.

A clause in the subscribers' agreement empowering the majority at any

meeting of not less than five directors to bind the rest and the company, does not authorize a meeting of three to do so, although they are unanimous and the other directors are summoned and fail to attend. *Ex parte Morrison*, 539.

See PETITIONING CREDITOR; REPUTED OWNERSHIP, 3.

### PUBLIC POLICY.

See COMMISSIONER OF BANKRUPT, 1, 2; SHARES.

### REFUNDING.

See MORTGAGE, 2.

### REPUTED OWNERSHIP.

1. A mortgagee of a policy of assurance deposits it by way of sub-mortgage, and gives notice of the sub-mortgage to the insurance office, but not to the original mortgagor.—*Held*, that this was sufficient to take the policy out of the reputed ownership of the mortgagee.

A bond which is executed to secure the payment of bills of exchange, is mortgaged together with the bills which are endorsed. Afterwards the mortgagor deposits the bonds and the bills by way of sub-mortgage and becomes bankrupt, no notice of the submortgage having been given to the obligor.—*Held*, that the submortgage was good against the assignees.

Deposit by way of mortgage of a land order of the New Zealand Company—*Held* to be good, without notice being given to the company of the deposit. *Ex parte Barnett*, 194.

2. Submortgagees of shipments at Ceylon and Hong Kong, sent thither, directed to the parties in possession, notices of their security by the next direct mail, there being another and earlier mail by a different rout, by which the notices might possibly have sooner reached their destination; before, however, this could have taken place, by either mode of transmission, the submort-

gagors became bankrupt.—*Held*, that the notice was sufficient to take the goods out of their reputed ownership.

A man may give a valid security on merchandize at sea belonging to him, although at the time he is ignorant of the particulars of which it consists. *Ex parte Kelsall*, 352.

3. Shares in a waterworks company held subject to the law of reputed ownership, the company's act of parliament declaring them to be personal property. *Ex parte Lawrence*, 269.

4. Oil merchants give a lien on oil belonging to them in the hands of other persons to a creditor, who, trusting to an incorrect representation of the oil merchants, delays taking possession or giving notice of lien, and the merchants repossess themselves of the oil, mix it with their general stock and become bankrupt.—*Held*, that the lien was good, and that the oil was not in the order and disposition of the bankrupts with the consent of the true owner. *Ex parte Bell*, 577.

5. *Quære*, as to the effect of a joint possession of the servants of the bankrupt and of the owner of goods as to reputed ownership? *Ex parte Majoribanks*, 466.

See COMPOSITION DEED, 3; PARTNERS, 5, 7.

### SALE.

See OPENING BIDDINGS.

### SECURITY.

See REPUTED OWNERSHIP, 2.

### SEPARATE DEBT.

See STATUTE OF FRAUDS.

### SEPARATE ESTATE.

See PARTNERS, 3, 5, 6, 7; PROOF, 5.

### SERVICE.

See COSTS, 4.

### SET OFF.

See LIEN; PARTICULARS OF DEMAND.

## SETTLEMENT.

See COVENANT.

## SHARES.

A purchase by brokers in pursuance of the order of a customer of shares in a projected railway company provisionally registered—*Held* not illegal but a sufficient ground for the admission of a proof tendered by the brokers for the loss occasioned by the non-completion of the purchase by the customer. *Ex parte Barton*, 316.

See REPUTED OWNERSHIP, 3.

## SINE DIE.

See BANKRUPT, 1.

## SOLICITOR.

1. Under particular circumstances solicitor to the fiat permitted to purchase part of the bankrupt's estate. *Ex parte Watts*, 265.

2. It is not correct or according to the course of the Court for the assignees to employ as their solicitor the partner of one of them who is a solicitor, and when this appeared to be the case the Court directed the circumstances to be intimated to the Commissioner. *Ex parte Downes*, 390.

3. Where the solicitor to the fiat received and paid all monies on account of the estate, and at the audit the accounts were verified by his affidavit as to their accuracy, and the affidavit of the assignees that they had neither received nor paid anything except what had been so received and paid by the solicitor; but there was nothing to shew that either of the assignees had either, as to information or belief, verified the accuracy of the accounts:—*Held*, that the accounts ought to be opened and retaken although three years had passed since the audit.

The retainer by the solicitor under such circumstances of the amount of his bill of costs as taxed by the

Commissioner, and the allowance of such retainer at the audit—*Held* no such payment of the bill as to preclude retaxation.

Whether the Commissioner has jurisdiction to open accounts audited and passed by Commissioners under the old jurisdiction, *quære*. *Ex parte Rees*, 205.

4. Where the assets had been sold by the assignee on credit, and part only of the purchase money was paid, which was applied in part payment of the bill of costs of the solicitor to the commission, and after a lapse of several years the assignee was ordered to make good the remainder of the purchase money out of his own pocket—*Held*, that out of this money so made good the solicitor was entitled to be paid the remainder of his bill, although it was recovered without his assistance, and although more than six years had elapsed since the date of the most recent item in the bill. *Ex parte Brutton*, 116.

5. *Quære*, whether the bill of costs of the solicitor of the petitioning creditor is payable, without receiving sufficient to pay the office fees of 10*l.* and 20*l.* payable in the event of assignees being chosen, no creditor having proved, and the bankrupt having obtained his certificate. *Ex parte Hembery*, 442.

6. *Semble*, that it must be a grave cause of complaint against an attorney of the Court, to induce the Court to interfere summarily against him, for conduct not relating to a matter within the jurisdiction of the Court. *Ex parte Shuckhard*, 454.

7. Where a country solicitor, admitted as a solicitor of the Court of Review, had, under a mistaken notion, taken an affidavit of debt (as a master extraordinary in Chancery) to serve as the foundation of an act of bankruptcy, and appeared upon a petition to annul the fiat, and submitted to the jurisdiction of the Court, he was ordered to pay the

costs of annulling the fiat. *Ex parte Benbow*, 443.

See COSTS, 3, 4, 5; OFFICE FEES, 7, 8; OFFICIAL ASSIGNEE, 1; PARTICULARS OF DEMAND; PRODUCTION.

### STATUTE OF FRAUDS.

A parol agreement is sufficient to convert a separate into a joint debt—such an agreement not being “a promise to answer the debt of another” within the Statute of Frauds, but the creation of a new debt in consideration of the former being extinguished. *Ex parte Lane*, 300.

### STOPPAGE IN TRANSITU.

1. A vendor of cotton in America, by direction of the purchasers in England, ships the cotton on board a vessel belonging to the latter, who became bankrupt before its arrival. A mortgagee of the ship, who happens to be an agent of the vendor, takes possession of the ship under his mortgage, and sells the cotton under a supposed right on the part of his principal to stop it *in transitu*, and the principal sanctions the transaction as between himself and the agent, by accepting a credit in account for the proceeds of the cotton. The assignees of the purchasers then bring an action against the mortgagee for this seizure, and he pays them under a compromise the amount for which the cotton sold.—*Held*, that under the circumstances the contract was not rescinded by the seizure of the cotton, but that the vendor was entitled to prove for the purchase money. *Re Humberston*, 262.

2. A vendor of cotton in America, by direction of the purchasers in England, ships the cotton on board a vessel belonging to the latter.

The purchasers become bankrupt, and afterwards the vessel arrives in England, and is taken possession of by a mortgagee in right of his mortgage. The mortgagee happens to

be a partner in a firm who are the agents of the vendor, and, upon a notice from them claiming a right to stop the cotton *in transitu*, he permits them to take possession of it. They sell it at a loss, and give their principal credit in his account for the proceeds. The vendor becomes bankrupt. An action of trover for the cotton is commenced against the mortgagee by the purchasers' assignees, and is compromised upon the terms of the purchasers' assignees proving against the estate of the vendor for the amount of the proceeds, for the benefit of the mortgagee; the latter agreeing, in the event of no dividend being paid by a certain day, that judgment for the full amount of the proceeds should be entered up against him in the action. Proof is made accordingly, but no dividend paid, and the mortgagee pays the full amount of the proceeds of the sale to the purchasers' assignees. The vendor's assignees then tender a proof for the original price of the cotton against the estate of the purchasers.—*Held*, that the proof ought to be admitted for the full amount. *Ex parte Molyneux*, 121.

### SUMMONS.

See PARTICULARS OF DEMAND.

### SURETY.

A bond was entered into by a principal and three sureties. The principal, and one of the sureties, compounded with their creditors, and the other two sureties became bankrupt. The obligee proved the full amount of his debt against the separate estates of the two bankrupts, and claimed under the compositions; and by these means received 20s. in the pound, but the estate of the compounding surety paid more than its contributive share.—*Held*, that that estate was entitled to the benefit of the proof made by the obligee against the

bankrupt surety. *Ex parte Stokes*, 618.

*See* BILL OF EXCHANGE, 2.

### SURRENDER.

Where the bankrupt left England on account of his embarrassments, and consequently did not hear of the fiat till after the time for surrendering had expired, he was not allowed his costs on petitioning for leave to surrender. *Ex parte Perry*, 377.

*See* ANNULLING, 5, 6; PUBLIC COMPANY, 2.

### TAIL.

*See* TENANT IN TAIL.

### TAXATION.

*See* SOLICITOR, 3.

### TENANT IN TAIL.

Where a trader sold an estate, and conveyed it as tenant in fee-simple, with the usual covenant for further assurance, and becomes bankrupt, and it was afterwards considered that he was tenant in tail only, it was ordered that the Commissioner should be at liberty to execute a deed of confirmation to the purchaser. *Ex parte Fripp*, 293.

### TENDER.

*See* ASSIGNEE, 5.

### TIME.

*See* ANNULLING, 5, 8; MORTGAGE, 2; SOLICITOR, 4.

### TRADING.

A farmer in the Isle of Thanet, occupying two farms, containing together 200 acres, kept five cows, four of which were Alderneys, and seven horses, and no other stock.—*Held*, that his selling the milk of the cows regularly to a retail dealer in Margate, who paid for it on an average 30s. a week, did not render

him subject to the bankrupt laws as a cowkeeper. *Ex parte Dering*, 398.

2. A tenant of 130 acres, under a farming lease, which obliges him to fallow or plant with peas or potatoes (among other things) every third year, has on his farm twelve acres of young potatoes and twenty acres of green peas, growing in open fields every year, and consigns the produce for table consumption to London salesmen, to whom he allows such commission as is usually allowed by market gardeners.—*Held*, that he was not a market gardener within 5 & 6 Vict. c. 122, s. 1. *Ex parte Hammond*, 93.

### TRANSITU.

*See* STOPPAGE IN TRANSITU, 2.

### TRUST.

*See* BREACH OF TRUST, 1, 2, 3; PROOF, 5.

### TRUST DEED.

*See* ANNULLING, 4; COMPOSITION, 1, 4.

### TRUSTEE.

1. Where bankrupts were entitled in possession to the income of some of the trust funds, of which one of the bankrupts is trustee—*semble* that the Court of Review cannot appoint a new trustee without the assignees joining as petitioners. *Ex parte Cousen*, 451.

2. Upon a petition to appoint new trustees, the Court of Review will not decide any question as to who are the *cestuis que trustent*. In case of doubt all who, by possibility, may be held to fill that character, must be parties. *Ex parte Congreve*, 267.

*See* ASSIGNEES, 2.

### TWENTY PER CENT.

*See* ASSIGNEES, 5.



## VENDOR AND PURCHASER.

In a contract for a purchase of land, there is a stipulation that the conveyance shall be made subject to certain conditions and restrictions as to building upon the land, and to a covenant for their observance and proper provisions for securing the due performance thereof.—*Held*, that this contract entitled the vendor to have a power of entry inserted in the conveyance, in case of a breach of the covenant, but not to have a term of years or a rent-charge limited to a trustee. Form of the power of entry which the vendor is entitled to have.—Whether such covenants as the above run with the land, *quære*. *Ex parte Ralph*, 219.

*See* OPENING BIDDINGS.

## VENUE.

1. The circumstances that the majority of the creditors and a large proportion of the debtors to the estate reside within the jurisdiction of a district Court, within which the trading took place, and out of which the bankrupt removed shortly before the bankruptcy, with the view, as it was stated, of having a friendly fiat issued against him, in a Court where his conduct could not easily be investigated, that other bankruptcies

with which the one in question was connected were in course of prosecution in the district Court, and that many of the creditors were unable to afford the expense of a journey to London—*Held* insufficient grounds for transferring the fiat from London to the district Court, on a petition presented by creditors two months after the choice of assignees, and opposed by the assignees and the bankrupt. *Ex parte Downes*, 390.

2. The place of business of the bankrupt was in a town situated partly in one county and partly in another, but was actually in the one of the two counties belonging to the more remote district Court.—*Held*, that the fiat ought not to be transferred on this account to the nearer Court. *Ex parte Baylies*, 440.

3. Bankrupt allowed his expenses arising from changing the venue of the fiat after adjudication. *Ex parte Cheeseborough*, 333.

## VOTE.

*See* ASSIGNEES, 2.

## WARRANT.

*See* COMMITMENT, 4.

## WINDING UP.

*See* PUBLIC COMPANY, 1.

THE END.

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REPORTS  
OF  
CASES IN BANKRUPTCY

ARGUED AND DETERMINED IN  
THE COURT OF REVIEW,

AND ON  
APPEAL BEFORE THE LORD CHANCELLOR.

BY  
JOHN DE GEX,

ESQUIRE, BARRISTER AT LAW.

---

ON:—S. SWEET, 1, CHANCERY LANE; H. BUTTERWORTH, 7, FLEET STREET  
MAXWELL, 26, BELL YARD; and V. & R. STEVENS & G. S. NORTON,  
(Successors to J. & W. T. Clarke,) PORTUGAL STREET & BELL YARD;

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# C A S E S

## IN

# B A N K R U P T C Y.

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Ex parte JOHN HOOKINS,

In the Matter of SAMUEL GUNDRY and WALTER EUSTACE  
GUNDRY, Bankrupts.

1849.  
Jan. 24th.

**T**HIS was a petition by way of appeal from the rejection of a proof upon two bonds, under the following circumstances:—

The bankrupts carried on business as bankers at Bridport.

In September, 1812, the bankrupt Samuel Gundry gave to his sister Mrs. Hookins a bond to secure 3000*l.*; the consideration for which was stated by the petition to be, a promise made by Samuel Gundry to his father, on his death-bed, to provide for Mrs. Hookins, the father having left nearly all his property to the bankrupt Samuel Gundry. Upon the bond it was expressed to be agreed that the principal money should not be called in until five years after the death of the bankrupt Samuel Gundry. The bankrupt Samuel Gundry regularly paid the interest on the bond till the death of Mrs. Hookins, which took place in 1841. By her will she bequeathed all her property to her three children, one of whom and the husband of an-

A partner in a bank gave a bond to his sister in performance, as it was alleged, of a promise voluntarily made to their father on his death-bed. The sister died, having specifically bequeathed the sum secured by the bond. The bankrupt gave the legatees fresh bonds for sums amounting together to the sum secured by the original bond, in consideration of the delivery up of that instrument. Six years afterwards, the partners in the bank, including

the obligor, became bankrupt; and it appeared that, at the times of both the transactions, the firm must have been insolvent, and that the obligor must have then known or suspected this to be the case; but that the transactions were entered into fairly, and without reference to this circumstance. There was no evidence, however, of any notice or suspicion on the part of the obligees:—*Held*, that they were entitled to prove upon the bonds.

1849.  
*Ex parte*  
HOOKINS,  
*In re*  
GUNDRY.

other she appointed her executors. Sometime after her death the bankrupt gave to each of these legatees a bond for 1000*l.*, payable at the expiration of five years from his death, with interest in the meantime, in consideration of their delivering up the original bond and releasing him in respect of it. The bankruptcy took place in 1847; and under the fiat the obligees in two of the substituted bonds tendered upon them the proofs now in question.

Mr. *Russell* and Mr. *E. W. Cox*, for the appellants.

The VICE-CHANCELLOR referred to *Ex parte Berry* (a) and said, that at present he only desired to hear the appellants' counsel on the question relating to the bankrupt's circumstances when he gave the substituted bonds.

Mr. *Russell* and Mr. *E. W. Cox*.—In *Ex parte Berry*, the first bond was voluntary, and it appears that the bankrupt had called a meeting of his creditors; yet Lord *Eldon* said: "the first bond was clearly good as between the obligor and obligee; and, had payment been enforced by process of law upon that security, it is very difficult to maintain that the money paid could have been recovered. The obligee, instead of payment, gives another bond which was not voluntary, being given upon cancelling the former security."

This case is a decision in favour of the proof, unless there is a want of good faith in the transaction, as where it is a mere attempt to substitute a valid for an invalid security. There is no proof here of any such want of good faith, or indeed of insolvency at the time; for the bank stood its ground for six years after the transaction. There is no allegation that they dishonoured a bill or refused a cheque during the whole of this period.

Mr. *Swanston* and Mr. *Shapter* for the assignees.—During the whole six years the bankrupts were insolvent, and knew themselves to be so. They never ceased to be insolvent during the whole period. From 1825 the history of this bank is a continued state of insolvency. In that year the deficiency appears to have been 36,000*l*. Now, it is clear, that if a man in a known state of insolvency gives a voluntary bond, the obligee cannot prove in competition with creditors for valuable consideration. [The *Vice-Chancellor*.—I assume, at present, that the original bond was given voluntarily, but not unfairly (a).] That is sufficient for our case, for the bankrupt knew the state of his own circumstances; and it is not necessary, to invalidate the bond against creditors for value, that the obligee should have known them also. *Ex parte Berry* (b) is conclusive in our favour, for it appears from the report, that, after making the observations which have been read on the other side, Lord *Eldon*, on learning that there was an affidavit of the bankrupt's insolvency when the second bond was given, said, that he could do nothing for the bond creditor. [The *Vice-Chancellor*.—From the marginal note it would seem, that the impression made by that case upon the reporter's mind was, that the circumstance of the insolvency by itself was not enough.] Or it may be, that the reporter considered the proposition in the marginal note to be sufficiently established by the fact of insolvency. There may be fraud in equity without actual moral turpitude.

The VICE-CHANCELLOR, in the course of the argument, asked for the affidavits in *Ex parte Berry*. But there did not appear to have been any affidavit except the ordinary affidavit of service of the petition. His Honor said, therefore, that he supposed it was argued upon admissions.

(a) See *Ex parte Mudie*, 3 Mont. idge, 5 Taunt. 36.  
D. & D. 66; and *Lee v. Mugger-* (b) 19 Ves. 218.

1849.

*Ex parte*  
HOOKING,  
*In re*  
GUNDRY.

1849.  
} *Ex parte*  
HOOKINS,  
In re  
GUNDRY.

At the conclusion of the argument, his Honor said—

My impression of the case *Ex parte Berry* is, that Lord Eldon did not act upon the mere evidence of insolvency, but inferred, that the second security had been given, not only with a knowledge of the failing circumstances of the obligor, but with a view to bankruptcy, and for the purpose of assisting and improving the case of the obligee. So understanding the case of *Ex parte Berry*, I entirely agree with it. If I had understood it otherwise, I should follow the authority.

In the present case, I do not understand it to be suggested, that either of the obligees had, at the date of the bonds, any knowledge or notice of the insolvency or failing circumstances of Samuel Gundry or of the Bridport Bank, or intended to act fraudulently or unfairly. That I take to be the state of the evidence as to the obligees. Then with regard to the obligor, it may be, that he at least suspected the bad circumstances of his firm, or would have done so, if his attention had been directed to the matter; but I believe that neither his pecuniary circumstances, nor the circumstances of his house, entered into his motives in giving the bonds. I believe, that, on his part, the transaction was not in the slightest degree connected with actual or apprehended insolvency or bankruptcy, or with any view or notion that would not equally have been in his mind, if he had been one of the wealthiest men in England. I consider the transaction to have been fair in every respect, and in no sense with the view or intention of bettering the case of the obligees as against the general creditors of the obligor the bankrupt.

That being so, I think that the proof must be admitted; I repeat that I would not so decide, were I of opinion that, by doing so, I should be contravening Lord Eldon's opinion in *Ex parte Berry*.

I hardly consider myself as differing from the Commis-



sioner; I have not the same evidence as he had; and he seems rather to have left it to this Court to decide, than to have decided it himself.

1849.  
*Ex parte*  
 HOOKINS,  
*In re*  
 GUNDRY.

Ex parte MARTHA MILLER,

Jan. 24th.

In the Matter of CHARLES HENRY SWANN, JOHN SWANN,  
 and WILLIAM SWANN, Bankrupts.

THIS was the petition of an annuity creditor, seeking a valuation of her annuity, and the sale of certain copyhold lands, of which the documents of title were deposited to secure the annuity. It prayed, in the usual form, the application of the proceeds of the sale in payment of the value of the annuity, and leave to prove for the difference.

The only question was, whether the securities for the annuity were sufficiently enrolled.

The securities were, first, a bond, dated April 11, 1835, whereby, in consideration of 500*l.* paid to the bankrupt John Swann by the petitioner, the bankrupts John Swann and William Swann, and their father, since deceased, became jointly and severally bound to the petitioner in the penal sum of 500*l.*, subject to a condition making the bond void on punctual payment of an annuity of 60*l.* to the petitioner for her life. Secondly, the deposit, by the bankrupt, with the petitioner of the title deeds of a copyhold estate, with a written memorandum, expressing that the deposit was made by way of further security for the payment of the annuity.

A memorial of the bond was duly enrolled in Chancery, in pursuance of the 53 Geo. 3, c. 141; but the memorandum of deposit was not noticed.

Mr. Webb, in support of the petition.—It is not neces-

Documents of title were deposited, with a written memorandum expressing that they were deposited to secure an annuity, also secured by bond. The bond was enrolled but not the memorandum. The Court declined to direct a sale of the property comprised in the security.

1849.

*Ex parte*  
MILLER,  
*In re*  
SWANN.

sary that the memorandum of deposit should be enrolled. In *Morris v. Jones* (a), there was a grant of an annuity which was enrolled, and there was an assignment of certain policies, which were to be re-assigned on redemption of the annuity. It was there contended, that, as these policies were of considerable value, the assignment ought to have been enrolled; and that, for want of enrolment, the grant of the annuity was void. But the Court of Queen's Bench held otherwise. The explanatory Act of 3 Geo. 4, c. 92, expressly provides (sect. 2) that a deed granting an annuity, if duly enrolled, shall be valid, although some other deed securing the annuity is not enrolled.—He also referred to *Doe v. Bingham* (b).

Mr. *Russell* for the assignees.—There is no substantial difference between the Acts 53 Geo. 3, c. 141, and 3 Geo. 4, c. 92; all that the 2nd section of the latter Act declares is, that the want of enrolment of one deed shall not invalidate another. But it is upon the unenrolled security that the present order is sought.—He referred to *Rosher v. Hurdis* (c), and *Sandilands v. Marsh* (d).

Mr. *Webb*, in reply, submitted, that, as the deposit would have been good without a memorandum, the want of enrolment of that document could not affect the case, except as to costs.

THE VICE-CHANCELLOR:

I think that there is, for this purpose, no substantial difference between the two Acts. I will, however, give the petitioner the opportunity of entering a claim and filing a bill; and, unless she should do so within a limited time, the petition must be dismissed, with costs.

(a) 2 B & C. 232.

(b) 4 B. & Ald. 672.

(c) 5 T. R. 678.

(d) 2 B. & Ald. 673.

1849.

Jan. 24th.

Ex parte WILLIAM PENNELL and Others,  
In the Matter of JOSEPH TURNER, a Bankrupt.

**T**HE fiat was issued on the 18th of January, 1848.

On the 2nd of November, 1848, the bankrupt presented his petition for leave to surrender, and that the costs of the petitioner might be paid out of the estate. In support of that petition, the petitioner made an affidavit, that he left England for the Cape of Good Hope in 1847, on account of family disagreements; and that, at that time, he believed there were ample funds to pay all his creditors twenty shillings in the pound; that he returned to England on the 9th of September, 1848, and had no notice before the 10th of September, 1848, of the fiat.

On the 15th of November, 1848, an order was made upon this petition, which was not opposed by the assignees, giving leave to the bankrupt to surrender, and directing payment of the costs of the bankrupt and of the assignees out of the estate.

The assignees now presented a petition, stating, that on the 8th of December, 1848, a sitting was held for the surrender, in pursuance of the order of the Court; and that the bankrupt then stated, that, finding he was embarrassed in his pecuniary circumstances, and had many bills then becoming due, and having received a threatening letter from one of his principal creditors, he, on or about the 14th day of December, left England, without notice to his wife or family, and sailed for the Cape of Good Hope; that he had previously had disputes with his wife's father on pecuniary matters; but that his reason for quitting England was the embarrassed state of his affairs. That he also stated that, on leaving his place of business, he took with him various goods, consisting of cutlery, guns, bridles, and whips, for the sale of which he afterwards obtained, in different places at the Cape, 140*l.*; and that he took with him, in money,

A bankrupt obtained an order for leave to surrender, and for his costs to be paid out of the estate, on a petition supported by his affidavit, stating, that his surrender had been prevented by his having left England on account of family disagreements. The petition was unopposed. On appearing before the Commissioner to surrender, he was examined, and stated that he left England on account of his embarrassments. The assignees thereupon petitioned to have the former order discharged; but the Court refused to discharge it, holding that the circumstance would be properly regarded when the bankrupt applied for his certificate.

1849.  
Ex parte  
PENNELL,  
In re  
TURNER.

about 100*l*. The petition stated, that the Commissioner thereupon refused to take the surrender, and certified as follows:—"I have declined to take such surrender, inasmuch as the reason assigned by the bankrupt, on examination this day before me, for absenting himself from his place of business and departing this realm, is inconsistent with his affidavit, made in support of his petition to his Honor Vice-Chancellor *Knight Bruce* for leave to surrender."

The prayer of the present petition was, that the order of the 15th of November, 1848, might be discharged; and that all the costs of the former petition and of the petition now presented, might be paid by the bankrupt personally.

Mr. *Swanston* and Mr. *Sheffield* for the petition.

Mr. *Thomas* for the bankrupt.

THE VICE-CHANCELLOR:—

This question may be properly raised when the bankrupt shall apply for his certificate. He may never deserve his certificate; but that is not the question before me.

If the assignees had asked that the bankrupt should be examined, when he obtained the order to surrender, I might have ordered that to be done. As it is, I think the proper course is to dismiss this petition, with costs. I may add, however, that I do not intend my decision to have the effect of preventing the Commissioner from giving the costs of this petition to the assignees out of the estate, if he should so think fit.

1849.

Ex parte CHARLES STEWART,  
In the Matter of CHARLES STEWART.

Feb. 19th.  
May 2nd.

**T**HIS was a petition to have a fiat which had issued against the petitioner annulled for want of trading, under the following circumstances, as appearing upon the affidavits.

The petitioner was a barrister, and in 1842 became the lessee of two pieces of building ground, one at Notting-hill, and another at Shepherd's-bush. He entered into a contract with a builder, who thereby agreed to build on the ground a certain number of houses at a stated price.

This contract was afterwards abandoned, and the petitioner proceeded to build upon the ground 200 houses, purchasing the materials for this purpose.

As the houses were completed he let them; and, in the course of his dealings, with reference to these undertakings, he accepted a bill, addressed to him as "Mr. Stewart, builder."

He also brought an action of slander, on the ground that the slanderous expressions complained of had a tendency to injure him in his character of a trader subject to the bankrupt laws.

Mr. *Russell* and Mr. *Bramwell*, in support of the petition, contended, that a person who built houses for the purpose of letting them could not be considered a "builder" within the meaning of the Act.

The VICE-CHANCELLOR asked if there was any decision upon the point.

Mr. *Swanston* and Mr. *Bacon*, for the assignees, submitted, that the case was completely governed by *Ex parte*

A barrister, who took leases of three pieces of ground, and built houses upon them for the purpose of letting—*Held* not to be a builder within the meaning of the bankrupt laws; but, on it appearing that he had accepted a bill, addressed to him by the description of "builder," and had brought an action for slander, on the ground that the word complained of injured him as a trader, the fiat was annulled without costs.

1849.  
*Ex parte*  
 STEWART,  
*In re*  
 STEWART.

*Neirinckx* (a). *Ex parte Edwards* (b) was also referred to.

The VICE-CHANCELLOR:—

Having before me the case referred to, I cannot annul the fiat. I can only give liberty to the petitioner to bring an action for the purpose of having the question tried at law.

The petition was ordered to stand over, with liberty for the petitioner to bring an action.

*May 2nd.*

The petition now came on to be disposed of, an action having been brought, and the jury having found against the trading. At the trial, the Judge (Mr. Baron *Parks*), put to the jury three questions:—

First, whether there was evidence of the plaintiff having sold timber, sand, and other materials for profit? Secondly, whether the plaintiff was a builder in this sense, ready to build a house for any one who would give him an order for that purpose? Thirdly, whether the plaintiff, after building the houses at Shepherd's-bush, Notting-hill, and others, which it appeared that he had built in Bolton-row, meant to confine himself to those three instances; or whether he had an intention, generally, to enter into other building speculations?

The jury found, that the plaintiff did not buy and sell timber, sand, and other materials with a view to make a profit; secondly, that the plaintiff was not a builder in the sense of being ready to build a house for any one who might give him an order for the purpose; and, thirdly, that the plaintiff intended to confine himself to the three instances of building mentioned in the third ques-

(a) 2 Mont. & A. 384, 542.

(b) 1 Mont. D. & De Gex, 3.

tion, and had no intention of entering generally into other building speculations; and they thereupon found a verdict for the plaintiff.

A motion for a new trial was refused in Easter Term following, when Mr. Baron *Parke* observed, that he had put the third question to the jury with reference to the observations of the Chief Judge in *Ex parte Neirinoka*; and also, that he had so much doubt as to the question, whether Mr. Stewart was a builder within the meaning of the bankrupt laws, that, if the jury had found that he was a builder, he should have reserved that question for the opinion of the Court.

Mr. *Russell* and Mr. *Bramwell* now asked, that the fiat might be annulled.

Mr. *Swanston* contended, that the questions put by the learned Judge did not fairly raise the point in dispute. He also objected that the petitioner had withheld his books from his assignees, at the trial; so that the evidence was not fully before the jury.

The VICE-CHANCELLOR:—

In the first place, I am of opinion, that the finding of the jury is correct, with reference to the evidence before them. So treating that, I have next to consider, whether, if the books, which have been the subject of observation to-day, had been in the possession of the defendants at law in sufficient time before the trial, and had been laid before the jury, with all the observations properly belonging to them, there would have been further evidence before them, such as ought to have made a difference in the answer to any of the three questions put to them by the learned Judge; I am of opinion that there would not. I think that it would not have been right to make any difference in the verdict on the ground of any such addition to the evidence.

1849.  
*Ex parte*  
 STEWART,  
*In re*  
 STEWART.

1849.  
} *Ex parte*  
STEWART,  
} *In re*  
STEWART.

Next, it has been argued, that the three questions put to the jury did not exhaust the subject; and that, in particular, the third question ought to have been altered or added to. I am of opinion that, assuming the jury to have correctly answered the other questions put to them, whatever answer they might have given to the third question as altered in the manner now proposed on behalf of the respondents, it would have made no difference, and I should have held still, as I now hold, that this gentleman was not a builder within the meaning of the Act.

On the whole, I am satisfied, that this fiat is bad in law, and must be annulled. As to the costs, without saying whether the ruling of the learned Judge at the trial, or the ruling of the Court of Exchequer upon the application for a rule nisi for a new trial, or any decision now on this fiat that it must be annulled, is consistent or inconsistent with the case *Ex parte Neirinckx*, it is impossible to say, on this question of costs, that the existence of that case is a matter to be forgotten. To this consideration are to be added these, that this gentleman has accepted a bill drawn upon him by the description of "Mr. Stewart, builder," and has brought an action with a declaration, in which he has described himself as a trader subject to the bankrupt laws. The consequence is, that I shall give the successful party here no costs up to the time of my order directing or allowing the trial, inclusive. The costs since must be paid by the petitioning creditor.

Ordered accordingly; and that the costs of the trial, not exceeding 50*l.*, should be paid by the petitioning creditor, who was to be at liberty to set off against them the debt due to him from the petitioner.



1849.

Ex parte ROWLAND EVANS and Others,

Feb. 14th.

In the Matter of JOHN FOSTER, a Bankrupt.

1850.

May 1st.

BY an indenture, dated the 13th of July, 1841, and made between William Aggas of the first part, the bankrupt of the second part, Maria Foster his daughter of the third part, and the petitioners of the fourth part, being the settlement which was executed prior to and in contemplation of the marriage between William Aggas and Maria Foster, the bankrupt covenanted with the petitioners, their executors, administrators, and assigns, that in case the intended marriage should be solemnised, the bankrupt, his heirs, executors, or administrators would pay or cause to be paid to the petitioners, their executors, administrators, or assigns, during such time, and so long as William Aggas and Maria Foster, or either of them, or any issue of the said intended marriage, immediately entitled under the provisions thereafter contained, should be living, an annuity of such an amount, as either alone, until any real or personal estate should devolve upon or vest in the said William Aggas and Maria Foster in her right, or any issue of the said intended marriage, under the said settlement of her said father and mother and the said thereinbefore-mentioned will or either of them or otherwise howsoever, or together with the clear annual produce to arise or be payable from any such real or personal estate, or both real and personal estate, as the case may be, after any such devolution or vesting as aforesaid should take place for the time being, would from time to time make up one full annuity or yearly sum of 150*l*.

The marriage took place, and no real or personal estate had yet devolved upon or become vested in William Aggas and Maria his wife in her right or any issue of them, or

A trader, upon his daughter's marriage, covenanted to pay, so long as the intended husband and wife, or any issue of the marriage, entitled under the provisions of the settlement, should live, such a sum as with the annual produce of any property which might be received as therein mentioned, would amount to 150*l*.  
—*Held*, that the payments of the annuity becoming due after the issuing of a fiat against the trader could not be proved.

1849.

*Ex parte*  
EVANS,  
*In re*  
FOSTER.

the petitioners, under or by virtue of the settlement, or otherwise howsoever.

On the 24th of October, 1842, the fiat issued.

On the 25th of March, 1843, the petitioners tendered a proof under the said fiat against the separate estate of the said John Foster for the value of the annuity, as a contingent debt; but such proof was rejected, on the ground that the contingencies on which the said annuity depended were such, that the value of the said annuity could not be ascertained.

At the date of the fiat 42*l.* 8*s.* 4*d.* was due and owing to the petitioners for arrears of the annuity; and on the 25th day of March, 1843, there was due and owing to them the sum of 105*l.*, including the amount of such arrears and a proportional part of the current half year up to the time of tendering the proof; and the petitioners were on that day allowed to prove, and were admitted as creditors, against the separate estate of the said bankrupt for that amount.

Under the joint estate dividends, amounting in the whole to 6*s.* 1*d.* in the pound, have been paid to the joint creditors.

The creditors upon the separate estate, including the petitioners, in respect of their said claim for 105*l.*, were paid in full, and a surplus from his separate estate was carried over to the credit of the joint estate.

On the 6th of March, 1843, the bankrupt obtained his certificate.

In and during the year 1848, and after the above distribution as aforesaid, a further sum of 121*l.* 4*s.* 6*d.* was received by the official assignee as part of the separate estate of the bankrupt, to which he became entitled in right of his wife.

The whole of the said annuity of 150*l.* per annum had continued to be, and still is, payable under and by virtue of the said indenture; and the instalments which accrued

due after the date of the above-mentioned proof down to the 21st of September, 1848, amounted to 823*l.* 16*s.* 8*d.*

The petitioners tendered a proof for the balance due in respect of this amount after deducting some payments which had been made by the bankrupt; but the Commissioner rejected the proof, because no case had been produced to him in which payments periodically accruing after the date of the bankruptcy had been admitted to proof.

The present petition was then presented, praying that the petitioners might be admitted creditors for 703*l.* 16*s.* 10*d.*, the above-mentioned balance, and might receive dividends thereon (not disturbing former dividends).

Mr. *Hardy*, in support of the petition, cited *Re Gales* (a), *Ex parte Myers* (b), *Ex parte Grundy* (c), *Ex parte Marshall* (d), *Thompson v. Thompson* (e).

An unreported case, before the Subdivision Court, of *Re Whitmore* (f), was referred to as containing a summary of the authorities, and as shewing, that in *Ex parte Grundy* the general point was taken, although it does not so appear by the report.

Mr. *J. Russell*, *amicus curiæ*, confirmed this statement.

The VICE-CHANCELLOR said, that the case did not seem to fall within the 56th section of 6 Geo. 4, c. 16, or within any other, as far as it appeared; and that he could not decide in favour of the proof without the opinion of a Court of law being obtained.

(a) 1 De G. 100.

(b) Mont. & B. 229.

(c) Mont. & M. 293.

(d) 1 Mont. & A. 118.

(e) 2 Bing. N. C. 169; and see 2 D. & C. 126.

(f) See the next case.

1849.  
Ex parte  
EVANS,  
In re  
FOSTER.

1849.

*Ex parte*  
EVANS,  
*In re*  
FOSTER.

A case, embodying the foregoing statement, was accordingly directed for the opinion of the Court of Common Pleas upon the following question:—

Whether the said Rowland Evans, Thomas Foster, and Charles Crompton are entitled to prove against the separate estate of John Foster (the bankrupt), in respect of the said annuity, for the instalments thereof accrued since the 25th day of March, 1843, the date of the first mentioned proof, or any or either of them, and receive dividends with the other creditors, not disturbing any former dividends?

The following certificate was sent by the Court of Common Pleas.

“This case has been argued before us by counsel. We have considered it, and are of opinion that Rowland Evans, Thomas Foster, and Charles Crompton, are not entitled to prove against the separate estate for the instalments mentioned in this question.

W. H. MAULE,  
C. CRESSWELL,  
E. W. VAUGHAN WILLIAMS,  
T. N. TALFOURD.”

1850.  
*May 1st.*

Upon the case coming back upon the certificate, the VICE-CHANCELLOR dismissed the petition, but directed the costs of both parties to be paid by the assignees, they consenting thereto.

1843.

In the Matter of WHITMORE, WELLS, and Others.

Feb. 18th.

IN this case, a proof was tendered, upon a covenant of the bankrupt Whitmore; and the case now came on for judgment in a Sub-division Court, consisting of Mr. Commissioner *Merivale*, Mr. Commissioner *Fonblanque*, and Mr. Commissioner *Holroyd*.

The facts appear in the judgment.

Mr. Commissioner *Merivale* pronounced the judgment of the Court as follows:—

The question in this case arises out of a settlement on the bankrupt's marriage, by which, after reciting an agreement on the part of the lady's father, to secure to the trustees of the settlement the principal sum of 4000*l.*, to be paid to them, together with interest, within a limited period; and further reciting, that it had been agreed, on the part of the bankrupt, that he should, by assignment of two certain policies of assurance on his life, secure to the trustees the principal sum of 5000*l.*, to be paid to them within three months after his death; and that they (the trustees) should stand possessed of the said two sums of 4000*l.* and 5000*l.* on the trusts thereafter mentioned; and after further reciting that the lady's father had, in pursuance of his agreement, executed a bond to the trustees for the payment of the 4000*l.* within one year after the marriage, it was declared, that the trustees should stand possessed of the said 4000*l.* upon trust, to suffer the same to remain on the security of the bond until six months after the death of the father, and then to sell and invest, and stand possessed of the securities upon the usual trusts of the settlement; and it was further witnessed, that the bankrupt thereby sold and assigned to the trustees the said two policies, to be held on the trusts after mentioned, appointing them his attorneys to recover the principal monies, and covenanting that he (the bankrupt) would pay the premiums, and produce to the trustees his receipts, and would also repay to the trustees any sums which they might have advanced in payment of premiums, in case of his making default; and, lastly, to do all such further acts as might be reasonably required for more effectually assigning the policies. The settlement contained a proviso for the purpose of preventing forfeiture, whereby the trustees were empowered, whenever they should think it expedient, to pay the premiums out of the interest of the 4000*l.* or of the securities on which it might be invested; and also another proviso, that if the bankrupt should, at any time during his life, pay to the trustees the two principal sums of 2000*l.* and 3000*l.*, secured by the policies, the trustees should re-assign to him the policies; and it was further declared and agreed, that the trus-

A trader covenanted by an antenuptial settlement to pay the premiums on certain assigned policies of insurance on his life, or, if he failed to do so, to repay to the trustees the amount which they should pay in respect of the premiums. On his becoming bankrupt—*Held*, that the trustees could not prove for the amount required by the offices to be paid to keep up the policies during the remainder of the bankrupt's life.

1843.

*In re*  
WHITMORE.

tees should stand possessed of the said principal sums of 2000*l.* and 3000*l.* secured by the policies, or of the 5000*l.* so paid in discharge of the same, upon trust, to pay the interest to the bankrupt during his life, then to his wife if surviving, and after the death of the survivor upon the trusts declared as to the 4000*l.* It is alleged, that the amount of the several successive premiums covenanted to be paid by the bankrupt during his lifetime, does not constitute a debt that is proveable, by reason of its being incapable of valuation according to the provisions of the 56th clause of the stat. 6 Geo. 4. Whether the absence of an express covenant for the payment of the principal sum secured might or might not be supplied in the present case by implication, arising out of the general nature of the agreement between the parties to the settlement, is not for our decision, because the proof tendered is for the amount of two several sums of 819*l.* 8*s.* and 1548*l.* 0*s.* 7*d.*, which are the sums stated to be required by the several offices to be paid in respect of the policies for the remainder of the bankrupt's life. To this form of proof it is our duty now to confine ourselves, and to consider, with reference to this, only the several cases which have been referred to in argument. In the case of *Ex parte Tindall* (a), the objections to the proof were, as in the present instance, that there was no debt actually contracted; and that, if any debt, it was not a contingent debt within the intention of the 56th clause of the statute. This case, it will be remembered, was first heard before Vice-Chancellor *Leach*, who held the debt proveable notwithstanding these objections, and that the Court ought not to limit the operation of the clause to one species of contingency. After this came the case of *Ex parte Grundy* (b), before the present Lord Chancellor,—a case which I well remember, from myself having argued it,—and this was a case in which, though the question principally considered was with reference to the retrospective effect of the statute, it is not true that the more general point of law passed sub silentio, it having been expressly raised by Mr. *James Russell*, who, in resisting the proof, contended, that *Ex parte Tindall*, being then under appeal, could not be admitted as an authority. However, in that case also, the proof was ordered to be received. In the case of *Ex parte Grundy*, however, a bond was given. A distinction was taken in *Ex parte Tindall* between bond and covenant; but, while the Court declined to express an opinion upon that point, it held, that the debt was not proveable, as being incapable of valuation, and so overruled the Vice-Chancellor's prior decision. From this last decision there was a petition for rehearing, which coming on before Lord *Brougham*, his Lordship, in deference to his predecessor, procured the assistance of Lord Chief

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(a) Mont. 462.

(b) Mont. & M. 293.

Justice *Tindal* and another of the Judges; and, after a very full hearing, the judgment of the Court was ultimately pronounced by Lord Chief Justice *Tindal* in favour of the proof being admitted. In arriving at this conclusion, his Lordship stated, that two questions had been raised: first, whether the bankrupt had contracted a debt payable on a contingency within the meaning of the statute; secondly, whether, if so, this was a contingency on which the Commissioners could set a value. On the first point, he held, that a debt was contracted, inasmuch as a covenant constitutes a debt, whereon an action of debt may be maintained; and that a covenant by a man for payment by his executors constitutes a debt, as much as if he himself had covenanted to pay it. That, though it might be doubted whether an action of debt, technically so called, would lie against the executors, this was only as to the form of action. But the opinion of the Court, in this instance, was not formed on the technical ground, but upon the substance and effect of an absolute covenant, that the the executors should pay a certain sum of money; and that, though it was possible the contingency might never happen, that uncertainty afforded no reason against its being within the meaning of the Act; and it was reasonable to presume, that the legislature, in using the word "contingency," meant it should apply to all such cases as fall under the ordinary acceptance of the term. Previous, in point of date, to this decision in *Ex parte Tindall*, the judgment of Lord *Brougham* had been pronounced in another of the cases which had been cited in argument, that of the *Lancaster Canal Company* (a), where his Lordship, in affirming, though on a different ground, the decision of the Vice-Chancellor, held, that there was no debt proveable; the ground of his opinion in that case being, that the covenant was not absolute, nor for a sum certain, but merely to pay all balances which might happen to be in the hands of the trustees, when required by the Company, and that no demand had been made, a ground which, it will be immediately seen, was wholly independent of that taken in *Ex parte Tindall*, with which it is quite consistent. This distinction between the two cases is no other, in fact, than the same which has governed most of the other cases referred to in argument against the admissibility of the proof, namely, —that the alleged debt is non-existent. So in *Yallop v. Ebers* (b), *Boorman v. Nash* (c), *Ex parte Thompson* (d), and also *Ex parte Marshall* (e). The case of *Atwood v. Partridge* (f) is among those which were referred to by the Commissioners as governing their decision in *Ex parte Marshall*, which decision was affirmed by the

1843.  
In re  
WHITMORE.

(a) Mont. 27.

(b) 1 B. & Ad. 698.

(c) 9 B. & C. 145.

(d) Mont. & B. 219.

(e) 1 Mont. & A. 118; 3 D & C. 139.

(f) 4 Bing. 209.

1843.

*In re*  
WHITMORE.

Court of Review; and as this is the case which seems most in point with the present of all those which have now been cited, I will shortly state the substance of it. It was the case of a covenant by A. for payment by B. of the premiums on a policy effected to secure a debt due from B. to the plaintiff. The premium becoming due was paid neither by B. (who had become bankrupt), nor by A., but the plaintiff himself paid it; and A. having in the meantime also become bankrupt, and having obtained his certificate, it was held, that the certificate was no discharge from the payment of the premiums. It is unnecessary to express an opinion as to what might have been our decision if the proof here had been otherwise presented to us; but the parties have, in this case, been advised to exhibit it in this shape, namely,—for the value of the policies, estimated according to the amount of the premiums. And it is argued, that this is an amount clearly capable of valuation; that, although there is strictly no debt, inasmuch as the covenant is to pay, not to the bankrupt, but to a third party, namely, the insurance company, yet, when it is considered that the policy has been made the subject of an absolute assignment, and that the covenant to pay is for the immediate benefit of those who are the objects of it, there can be no question that this is an obligation within the contemplation of the statute. There is, at least to my mind, much force in the reasoning in favour of the reception or admission of this proof, and sufficient, perhaps, to justify the expression of some desire that the provisions of the Act were extended to cases such as the present, of no unfrequent occurrence, undistinguishable in point of moral justice from those of *Ex parte Tindall*, and others already cited. But we apprehend that, whatever disposition may be felt to give effect to such an extension, it is too strongly opposed to the principle of a distinction between debts and mere liabilities, as it is laid down by the Chief Judge *Erskine* in the case of *Ex parte Marshall (a)*, to be acted upon. In *La Cote v. Gilman (b)*, a similar question to the present arose under the Insolvent Debtors Act, 51 Geo. 3, c. 125, s. 16; and it was contended, that premiums on a policy of insurance, payable after the 1st of May, 1811 (up to which day the Act operated in discharge, sect. 30), must be considered as sums of money payable by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever, within that section; but the Court of Exchequer thought otherwise, and held, that the debtor was not exonerated as to such premiums by his discharge under the Act. In the case of *Bennett v. Burton (c)*, a mortgagor, by a deed of mortgage for a debt of 1000*l.*, covenanted, as a further security, to insure his life for the mortgagee's

(a) 1 Mont. & A. 118; 3 D. & C. 139.

(b) 1 Price, 315.

(c) 12 A. & E. 657.



benefit, to deliver the policy to him, and to keep the premiums paid till the debt was discharged; and that if, in the meantime, the premiums should be in arrear, the mortgagor might pay them, and receive the amount from the mortgagee. The mortgagor afterwards took the benefit of the Insolvent Debtors Act, 7 Geo. 4, c. 57, and included the 1000*l.* in his schedule, stating also that the creditor held a policy of insurance on his life, with a joint security of A. B. for the payment of the premiums. It was held, that the mortgagor was not protected by his discharge, nor from an action of covenant at the suit of the mortgagee, for premiums becoming due after such discharge, and paid by the mortgagee on the mortgagor's default. Now, in the case upon which we have to decide, the bankrupt covenants to pay the insurance office certain premiums, and if he does not, the trustees may pay them, and he (the bankrupt) is to indemnify the trustees. It seems to us, that this indemnity is incapable of being estimated. If the trustees had paid a year's premium, and the bankrupt had died before the next premium became due, the amount of damage would have been the sum paid by the trustees; or it might have been, in addition to that, a fine imposed by the office for paying the premium too late. Again, if the bankrupt had died, and the payment of the last year's premium had been altogether omitted, the whole sum insured would have been lost. We think that this case is analogous to the cases of *Bennett v. Burton* and *La Coste v. Gilman*, and must be governed by them; but, independently of any authority, we also think that there was here no debt between the trustees and the bankrupt to which any of the clauses in the Bankrupt Act are applicable, and that, consequently, this proof must be rejected.

1843.  
In re  
WHITMORE.

1849.

March 5th.

Ex parte RICHARD CARRUTHERS and Others,  
In the Matter of JONATHAN HIGGINSON and RICHARD DEAN,  
Bankrupts.

A bill of exchange thus drawn—"Pay C. & Co. 7500*l.* value of same, which place against coffee per Vigilant:"—Held not sufficient to give a lien on the coffee for the amount of the bill.

THE petitioners were holders of a bill of exchange for 7500*l.*, drawn upon the bankrupts, in respect of a cargo of coffee, consigned to the bankrupts, by their orders, by Messrs. Lyon, Schwind, & Co., of Rio Janeiro. The bill was thus expressed: "Exchange, 7500*l.* sterling, Rio de Janeiro, 18th of September, 1847. At sixty days sight, pay this first of exchange, second, third, and fourth not paid, to the order of Messrs. Carruthers & Co., the sum of 7500*l.* sterling, value of same, which place to account against coffee per Vigilant, as advised by Lyon, Schwind & Co."

The bills of lading of the cargo were received by the bankrupts before the date of the fiat. The bill of exchange was not accepted, having arrived after the bankruptcy.

On the arrival of the cargo, the assignees of the bankrupts took possession of it. Their right to retain it was disputed by an indorsee of the bill of lading, and was the subject of an action (*a*). The petition prayed that the cargo might be sold, and that the amount due to the petitioners on the bill might be paid out of the proceeds.

Mr. Bacon and Mr. J. V. Prior contended, among other arguments, that the form of the bill was sufficient to give a lien; and that, as the bankrupts took the cargo with notice that this bill had been drawn upon them in that particular form, they must be held to have made the purchase on the footing of the agreement which the bill expressed, although they had not in form accepted the bill.—They

(*a*) See *Van Casteel v. Booker*, 18 L. J., Exch., 9.

cited *Ex parte Waring* (a), *Ex parte Perfect* (b), *Ex parte Parr* (c), *Ex parte Gledstones* (d), and *Burn v. Carvalho* (e).

1849.  
*Ex parte*  
 CARRUTHERS,  
*In re*  
 HIGGINSON.

Mr. Swanston, Mr. Russell, Mr. R. Palmer, Mr. Crompton, Mr. Greene, and Mr. Eddis, for the respondents.—The language of the bill of exchange merely imports that it is to be carried to a particular account, and is insufficient to create a lien.

Mr. Bacon, in reply, was stopped by the Court.

The VICE-CHANCELLOR:

These petitioners may not be, and probably are not, bound by the judgment of the Court of Exchequer, obtained by the assignees in the action twice tried before special juries at Liverpool. But, leaving this judgment entirely out of consideration, I think that the case of contract, independently of the form and language of the bill, rests in too doubtful and obscure a state to render it possible to act on it.

With regard to the form and language of the bill, it must be recollected, as was urged by counsel, that it has never been accepted. Still its form and language may be such as to shew the object and intention with which the goods were placed on board the *Vigilant*, and with which possession was obtained by Barton, Irlam & Higginson, or the captain of the vessel, by means of that delivery. The language of the bill is capable of being explained not only in such a manner as to create a lien, but is open to another construction. It may be, that the true construction is, that the bill simply directs to what account it is to be placed. It may have been intended to give a lien; but I cannot act upon such a construction of the instrument.

I will not preclude the petitioners from instituting a

- (a) 2 G. & J. 404.
- (b) Mont. 25.
- (c) 18 Ves. 65.

- (d) 3 Mont. D. & D. 109.
- (e) 4 My. & C. 690.

1849.  
*Ex parte*  
 CARRUTHERS,  
*In re*  
 HIGGINSON.

suit for establishing their claim, if they think fit so to do. Unless they establish it by a suit at law or in equity, I shall dismiss the petition without costs.

The order was for the petition to stand over, with liberty for the petitioners to bring an action or institute a suit; but if neither action nor suit should be commenced within six weeks, the petition was to stand dismissed.

*Jan. 24th.*  
*Feb. 1st.*

*Ex parte* JARED TERRETT HUNT,  
 In the Matter of JOSEPH BUSST.

A declaration of insolvency followed by a fiat within two months, *held* to be an act of bankruptcy sufficient to support another fiat issued after that period, on the annulling of the former fiat.

**T**HIS was the petition of the petitioning creditor.

On the 29th of March, 1848, the respondent Joseph Busst, being then a trader, filed, in the office of the Lord Chancellor's Secretary of Bankrupts, a declaration of insolvency, in the form of schedule D. to the 5 & 6 Vict. c. 122. On the 4th of April following, a fiat was issued against the respondent, on the petition of three creditors, and was duly forwarded to the Court of Bankruptcy for the Birmingham district.

Some of the creditors afterwards came to a resolution to give the respondent time to pay his debts, which he undertook to do in full, by four instalments; and a deed of inspection and letter of license was executed by the creditors and by the respondent, to enable the latter to carry the agreement into effect; and the fiat was, consequently, never opened.

The respondent continued to carry on business, but failed in the payment of the second of the above-mentioned instalments. The creditors then resolved to proceed in

bankruptcy; but inasmuch as the respondent had incurred debts and had traded since the fiat was issued, it was thought advisable to annul it, and issue another.

Accordingly, on the 18th of December last, the petitioner presented a petition to annul the first fiat; which was annulled accordingly.

On the same day, another docket was struck; and on the 23rd of December, 1848, a second fiat was issued, on the petition of the present petitioner, Jared Terrett Hunt.

The act of bankruptcy relied on in support of the second fiat, was the declaration of insolvency filed on the 29th of March, 1848, on which the first-mentioned fiat issued within two months; it being considered, that the issuing of this fiat, although it was afterwards annulled, was sufficient to satisfy the provision in the Act. On proceeding to open the second fiat, Mr. Commissioner *Daniell* was satisfied with all the requisites except the act of bankruptcy, but considered the declaration of insolvency not sufficient, inasmuch as the second fiat was not issued within two months after the filing of the declaration.

The prayer of the petition was, that the Commissioner might be ordered to adjudicate the respondent to be a bankrupt upon the second fiat, or that it might be ordered that the first fiat issued against him might be proceeded with, notwithstanding the same had been annulled, as mentioned in the said petition, and that the conduct of the proceedings under the same fiat might be committed to the petitioner. It was intimated to the Court, that the Commissioner was desirous of having the point decided for his guidance.

Mr. *Swanston* and Mr. *Shapter* in support of the petition.—The declaration of insolvency is a good act of bankruptcy to support the second fiat, for all that the 5 & 6 Vict. c. 122, s. 22 requires, is thus expressed: “provided a

1849.

*Ex parte*  
HUNT,  
*In re*  
BUSEY.

1849.  
*Ex parte*  
 HUNT,  
*In re*  
 Bussr.

fiat in bankruptcy shall issue against such trader within two months from the filing of such declaration (a).” That requisition is satisfied in the present case, as a fiat did issue within the time. [The *Vice-Chancellor*.—Is not the meaning of the clause this, that the declaration of insolvency is capable of supporting a fiat issued within two months, and is not capable of supporting one issued at a later period?]

There is an unreported decision of Lord *Cottenham’s* in our favour, upon the exactly similar words of the proviso in the 1 & 2 Vict. c. 110, s. 8, by which default in paying or securing a debt is made an act of bankruptcy, “provided a fiat in bankruptcy shall issue against such trader within two calendar months, &c.” The case is *Ex parte Parker* (b). There is a marked difference between the frame of these sections and that of the 6 Geo. 4, c. 16, s. 6, which also enacts, that a declaration of insolvency shall be an act of bankruptcy, but provides that no commission shall issue thereupon, unless it be sued out within two calendar months next after the insertion of the advertisement of the insolvency. The change in the provision must have been made designedly, and for the purpose of definitively constituting an act of bankruptcy as soon as a fiat issues, although it may not be the fiat which is ultimately prosecuted.—They also cited *Gibson v. Muskett* (c).

#### THE VICE-CHANCELLOR:—

Independently of authority my own opinion would probably have been different; but I consider myself bound, by the decision of the Court of Review and the Lord Chan-

(a) The corresponding provision in the new Act, 12 & 13 Vict. c. 106, s. 104, is similarly framed.

(b) C. R., 28th November and

8th December, 1839; Lord Chancellor, December 24th, 1839; reported post, p. 575.

(c) 4 Man. & Gr. 160.

cellor in the matter of *Parker*, in November and December, 1839, on the 8th section of the stat. 1 & 2 Vict. c. 110, to hold the second fiat valid.

1849.  
*Ex parte*  
 HUNT,  
*In re*  
 BUSET.

Ex parte RICHARD PARKER,  
 In the Matter of RICHARD PARKER.

**T**HIS was the petition of the bankrupt, to annul the fiat for want of an act of bankruptcy. That relied upon was the omission to pay or secure a debt according to the 1 & 2 Vict. c. 110, s. 8.

The petitioner having failed to pay or give security for the debt, a fiat issued against him within the two months mentioned in the 8th section of the Act, but was afterwards annulled for want of prosecution at the instance of a creditor.

Afterwards, and after the expiration of the two months, the fiat issued which was now in question, upon the petition of the creditor, at whose instance the former was superseded.

Mr. *Bethell*, in support of the petition (a).—First, the fiat cannot be sustained, as it is not sued out by the creditor whose alleged debt the petitioner omitted to pay.

Secondly.—It is precluded by the proviso in the clause limiting its operation to fiats sued out within two months. The annulled fiat cannot satisfy the requirement of the Act, for it is the same as if it had not existed.—He referred to 6 Geo. 4, c. 16, s. 81.

Sir JOHN CROSS said, he had no doubt upon the first point. The omission to comply with the requisitions of

1839.  
 C. R.  
 Nov. 28th &  
 Dec. 6th.  
 L. C.  
 Dec. 24th.

A fiat was sued out, founded on an omission to pay or secure a debt according to the 1 & 2 Vict. c. 110, s. 8, which enacts, that such omission shall constitute an act of bankruptcy, provided a fiat shall issue within two months after the default. The fiat was not sued out by the creditor who made the affidavit of debt, and was afterwards annulled for want of prosecution. A second fiat then issued after the expiration of the two months: *Held*, that the failure to pay, &c., constituted a sufficient act of bankruptcy to support the second fiat.

(a) The report is taken from the note in the Court book of the day.

1839.  
*Ex parte*  
 PARKER,  
*In re*  
 PARKER.

the section was an overt act of insolvency; and the section was intended to apply to all the creditors. His Honor only required to hear the respondent's counsel on the second point.

Mr. *Swanston* for the respondent, the petitioning creditor.—It is a mistake to say, that the first fiat can be treated as a nullity. It was a valid fiat, and might be put in operation by an order in the nature of a writ of *procedendo*. Had it been otherwise, I would not argue the point.

Mr. *Bethell*, in reply.—There is no act of bankruptcy except under the Act. But the Act requires a fiat to be issued within two months. Can it be said that this requirement is satisfied by the issuing of the first fiat which has been annulled?

Sir JOHN CROSS.—The case is new, and not without difficulty. It requires much consideration. Perhaps the Court would not have annulled the first fiat, had the circumstances been brought under its notice.

*Dec. 6th.* On this day Sir *John Cross* gave judgment, dismissing the petition, and saying that Sir *George Rose* concurred in the decision.

*Dec. 24th.* On this day the matter was heard before the Lord Chancellor (Lord *Cottenham*), by way of appeal, on the following

#### SPECIAL CASE.

The Court hath found as follows:—That the petitioner, on the 22nd day of August now last past, was a trader within the meaning of the laws now in force respecting bankrupts, and was then indebted to one Lydia Rainsford in the sum of 100*l.* and upwards; and that the said Lydia



Rainsford did, on that day, file an affidavit in her Majesty's Court of Bankruptcy, that the said debt, amounting to the sum of 2500*l.*, was then justly due to her; and that the petitioner, as she verily believed, was then such trader as aforesaid; and the said Lydia Rainsford did afterwards, to wit, on the 26th day of August last, cause the petitioner to be served personally with a copy of the said affidavit, and with a notice in writing requiring immediate payment of the said debt.

And the Court hath further found, that the petitioner did not within twenty-one days after the said service and notice pay the said debt, nor secure or compound for the same to the satisfaction of the said Lydia Rainsford, nor did enter into any bond for securing the payment of the said debt or any part thereof, pursuant to the statute in that case made and provided, but wholly made default therein for twenty-two days then next following.

And the said Court doth further find, that, within two calendar months from and after the filing of the said affidavit, that is to say, on the 20th of September then next following, a fiat in bankruptcy was issued against the said petitioner on the petition of one Job Cox, to whom he was then justly and truly indebted in the sum of 100*l.* and upwards; and that the same was superseded for want of prosecution in due time at the instance of the said Joseph Foster, the petitioning creditor, who caused the fiat now in force to be issued in lieu thereof, on the 24th of October following, but after the expiration of two calendar months from the filing of the said affidavit.

And no other act of bankruptcy, except the default aforesaid, appears to have been committed by the said petitioner.

For the petitioner it was contended, that the law did not authorise any of his creditors, except the said Lydia Rainsford, to avail themselves of such act of bankruptcy; and that both the said fiats were, for that reason, invalid;

1839.

*Ex parte*  
PARKER,  
*In re*  
PARKER.

1839.

*Ex parte*  
PARKER,  
*In re*  
PARKER.

or, if not, that it was unlawful to sue out the fiat now in force after the expiration of the said two months from the filing of the affidavit.

Nevertheless, this Court, having also fully heard and considered the arguments and allegations of the counsel for the petitioner and for the said Joseph Foster, doth adjudge and determine that the said petitioner did become bankrupt within the true intent and meaning of the Act passed in the 1st and 2nd years of her Majesty's reign for abolishing arrest on mesne process, before the issuing of the said second fiat; and that the same is valid in law; and thereupon doth order that the said petition be dismissed.

Mr. *Bethell* appeared for the appellant.

Mr. *Swanston* for the respondent.

The LORD CHANCELLOR dismissed the appeal.



1849.

*Feb. 8th &*  
*12th.*

*Ex parte* ROBERT BURTON and Others,

In the Matter of RICHARD FORD, a Bankrupt;

AND

In the Matter of GEORGE HARVEY, a Bankrupt.

Where a petition, and the affidavits in support of it, had been wrongly intitled, and the petition had been amended under an order, the Court allowed the affidavits to be taken off the file to be amended.

MR. BACON and Mr. *Rogers*, on behalf of the petitioner, moved that the affidavits in support of the petition might be taken off the file, in order that the title of them might be amended, so as to correspond with the petition which had been amended under an order of the Court; and, when so amended, was intitled in both the above bankruptcies, but was originally intitled in only one of them.

The VICE-CHANCELLOR, after consulting the Registrar,

Mr. Vizard, said, he was informed that there were precedents (a) in the office of such an order, to which he saw no objection.

The affidavits were ordered to be taken off the file to be amended and resworn, the solicitor undertaking to restore them so amended within a week to the proper officer of the Court.

(a) *Re Coates*, 10th August, 1848; *Re Seddon*, 14th January, 1846, and 18th February, 1846.

1849.  
Ex parte  
BURTON,  
In re  
FORD;  
AND  
In re  
HARVEY.

Ex parte JOHN WARD,

March 7th.

In the Matter of JOHN WARD, against whom &c.

THIS was a petition to annul, for want of prosecution, a fiat which had issued against the petitioner.

Mr. Russell and Mr. Aspland supported the petition.

For the petitioning creditor it was objected, that the petition was one of course, and ought not to have been served.

Mr. Russell said, that the bankrupt was abroad, in the course of his business as the master of a vessel; and that, therefore, he could not sign the common petition, and that a special application became necessary.

The circumstance of a person against whom a fiat has issued being abroad, does not justify a special petition to annul for want of prosecution, as an ex parte application may be made to dispense with his signature.

The VICE-CHANCELLOR said, that a short ex parte application might have been made, and refused the bankrupt the costs of the present petition.

1849.

March 7th.

Ex parte SAMUEL WARD,

In the Matter of SAMUEL WARD, against whom &amp;c.

An order annulling, with costs, a fiat issued against the petitioner, will not be extended to the costs occasioned to him by the issuing of the fiat, other than those of the proceedings under it.

IN this case an order had been made, annulling, with costs, for want of legal requisites, a fiat against the petitioner; and the only question was, whether the costs should include the costs occasioned by the issuing of the fiat.

Mr. *Russell* and Mr. *Aspland* were for the petitioner.

The VICE-CHANCELLOR said, he could not make an order in that form. The order might extend to the costs of contesting the adjudication; but for anything further the petitioner must bring his action.

March 19th.

Ex parte RALPH ADDISON,

In the Matter of CHARLES SAXON HOOPER and RALPH ADDISON, against whom &c.

A trader, on a dissolution of partnership, left at the place of business a direction that letters were to be addressed to him at a particular post-office, at a shop.

The continuing partner afterwards instructed a solicitor to call a meeting of creditors, and the solicitor notified this to the retired partner, who neither sanctioned the meeting nor attended it:—*Held*, that neither of these omissions constituted an act of bankruptcy.

THIS was the petition of one of the bankrupts to annul the fiat, for want of an act of bankruptcy. From January, 1848 to 1849, the bankrupts carried on business in partnership, as merchants, at No. 23, Lawrence Pountney-lane.

On the 24th of August, 1848, the partnership was dissolved.

Both the partners had resided at the place of business, till the 8th of December, 1848, when the petitioner quitted the house, and went to reside in Quebec-street, where he had previously hired a bed-room, in order to be near his

retired partner, who neither sanctioned the meeting nor attended it:—*Held*, that neither of these omissions constituted an act of bankruptcy.

brother, who, with his wife and daughter, resided in that neighbourhood, and with whom he intended to reside, upon their obtaining suitable apartments. There was a memorandum in the diary at the counting-house, that any letters for the petitioner were to be addressed and forwarded to him, at Mr. Chews, Post-office, Crawford-street, Bryanstone-square. Addison's brother was well known to Mr. Chews. It appeared that on the 1st of January, 1849, the petitioner received a letter from the petitioning creditor's solicitor, dated the 29th of December, 1848, stating that the other bankrupt instructed him to call a meeting of the creditors of the firm on the 3rd of January, at 2 o'clock, at the solicitor's office.

1849.  
*Es parte*  
 ADDISON,  
*In re*  
 HOOPER.

The petitioner had not sanctioned the calling of this meeting, and he did not attend it. His solicitor however was present, and the meeting was adjourned to the 5th, in order to ascertain whether the petitioner would give up to the creditors the deed of dissolution; which he declined to do: and thereupon it was determined by the creditors that a fiat should be issued against the two. In support of the fiat, the housekeeper at the counting-house deposed, that she had no knowledge of the petitioner's residence; and that she believed he absented himself with intent to delay and defeat his creditors. Several persons, creditors, also deposed, that on applying at the counting-house they could not ascertain where the petitioner was to be found.

Mr. Russell and Mr. J. T. Hamilton in support of the petition.—The refusal to attend the meeting was no act of bankruptcy; nor can the petitioner's ceasing to reside at the place of business, after the partnership had ceased and it was no longer his place of business, be considered an absenting, so as to be an act of bankruptcy. By inserting an address in the diary he did all that it was necessary to do to enable the creditors to apply to him.

1849.

*Ex parte*  
ADDISON,  
*In re*  
HOOPER.

Mr. *Bacon*, for the assignees, cited *Ex parte Beer* (a) as to the non-attendance at the meeting.

The VICE-CHANCELLOR.—There the bankrupt concurred in calling the meeting. An address at a post-office cannot be considered as affording a trader's creditors proper means of access to him.

The VICE-CHANCELLOR inquired whether the respondents desired an oral examination; and being answered in the negative, his Honor said:—Had the respondents wished to examine witnesses, I should have adjourned the case for the purpose of enabling them to do so. I am of opinion that, upon the materials before me, I am bound to say, that an act of bankruptcy has not been committed by this gentleman. The fiat must be annulled as against the petitioner; but it is not a case for costs. The materials before me include important facts which were not before the Commissioner.

Fiat annulled, without costs.

(a) 1 Mont. D. & D. 390.

1849.

Ex parte ARCHIBALD KEIGHTLEY, HENRY STUBBS, GEORGE  
SMITH, and JOHN SMITH,

April 2nd.

In the Matter of JOHN STOCKDALE, a Bankrupt.

**T**HE petitioners Archibald Keightley and Henry Stubbs were transferrees of a legal mortgage in fee. On the transfer, the other petitioners George and John Smith, who were entitled to the equity of redemption, covenanted to pay the mortgage debt.

Afterwards, the petitioners George and John Smith conveyed the equity of redemption to the bankrupt, who by the conveyance covenanted with George and John Smith to pay the mortgage debt and indemnify them in respect thereof.

The present petition prayed for a sale of the mortgaged hereditaments, with leave for the petitioners George and John Smith to bid; and that the proceeds of the sale might be applied in payment of the mortgage debt; and, if they should be insufficient, then that the petitioners George and John Smith, on paying the deficiency to the other petitioners, might be at liberty to prove for the amount so paid by them, and to enter a claim in the meantime.

A mortgagee cannot have the usual order where the bankrupt is not the mortgagor but a purchaser of the equity of redemption, although the vendors of the equity of redemption, with whom the bankrupt has covenanted to pay the debt, join in the petition, and pray to be at liberty, after paying the deficiency, to prove for the amount.

Mr. *Hobhouse* supported the petition.

Mr. *Bacon* and Mr. *Follett*, for the assignees, were not called upon.

The VICE-CHANCELLOR.—A. is indebted to B., and C. covenants with A. to pay A.'s debt. Can B. be considered a creditor of C.? Has there ever been a case where Lord *Rosslyn's* Order has been enforced, in which there could be no proof by the mortgagee for the deficiency?

Petition dismissed.

1849.

May 23rd.

Ex parte HENRY THOMAS NEWTON,  
In the Matter of HENRY THOMAS NEWTON.

An assignee, who had acted as solicitor to the fiat, was allowed to charge for his clerk's time employed in the business of the bankruptcy, as costs out of pocket, but not any profit thereupon.

THIS was the petition of the bankrupt, praying, among other things, that the accounts of Mr. Moss, the assignee, which had been audited previously to the 11th of August, 1848, might be opened; that it might be referred to the Commissioner to review them; and that, in reviewing the same, the Commissioner might be directed to disallow all items contained in the bills of costs of the assignee (who had acted as solicitor to the fiat) other than those items which were for or in respect of money paid out of pocket by him.

The assignee had been the petitioning creditor, the bankrupt being indebted to him on mortgage, and also in respect of a bill of costs.

Dividends, amounting to 10s. in the pound, had been already paid to the creditors, who, with the exception of the assignee, had agreed to accept the remaining 10s. in the pound without requiring interest, and that thereupon the fiat should be annulled.

At the original hearing the accounts were directed to be re-audited.

The case now came on upon the Commissioner's certificate; and the principal question was, whether the Commissioner ought to have allowed the assignee anything for the services of his clerks.

Mr. *Swanston* and Mr. *Tripp* for the bankrupt.—An assignee acting as solicitor to the estate can make no professional charge, except for costs out of pocket.—They cited *Fraser v. Palmer* (a).

Mr. *Bacon* and Mr. *E. Webster*, for Mr. Moss, contended,

(a) 4 Y. & C. 515; see *Re Wyche*, 11 Beav. 209.



that, in addition to the costs specifically paid out of pocket by the solicitor, he ought to be allowed a fair amount in respect of the services of his clerks in copying and otherwise, for which he had really paid in the payment of their salaries, although the sums paid in respect of the business of the estate could not, from the nature of the case, be distinguished.

1849.  
*Ex parte*  
 NEWTON,  
*In re*  
 NEWTON.

Mr. *Swanston*, in reply, said, that no such exception from the rule had ever been allowed.

The VICE-CHANCELLOR.—Documents are sometimes copied by attornies in their own offices, and sometimes they are sent to law stationers. You say, that, if an attorney in the situation of Mr. Moss sends a document to be copied or written by a law stationer, and pays him for it, it is to be allowed; but that, if, instead of sending it to the law stationer, the clerk whom he has engaged at a salary is employed for a whole day or a whole week in doing the same work, then it is not to be allowed.

Mr. *Swanston*.—If it is to be the usual professional charge, that includes a profit, which in this case he cannot make; and he has no means of severing that charge, one part of which consists of expenditure, and the other part of profit.

The VICE-CHANCELLOR.—I consider the inference to be just and unavoidable, that a paid clerk or paid clerks of this solicitor has or have been employed for the purposes of the estate, and to that extent labour and skill, for which the solicitor has paid, have been employed for the benefit of others.

I am of opinion, that an order ought not to be made against the solicitor for refunding that which he has received or which has been allowed to him, without making

1849.  
Ex parte  
NEWTON,  
In re  
NEWTON.

an allowance as nearly approaching to what is fit and correct (without including any profit) as possible, in respect of the labour so taken from him for the benefit of others. An attempt must be made to ascertain it. At present, as I understand, nothing has been allowed him in that respect. And I think it very likely, that, if I had been in the place of the Commissioner, I should have thought that I could not under this reference do it, but should have left it to another jurisdiction. It is scarcely possible that it can be done with exactness, but as near an approach as possible must be made.

Perhaps the parties can agree on a sum; if not, I must send the matter back to the Commissioner for an inquiry, the language of which will require some consideration.

Mr. *Bacon* said the amount was not an object with Mr. Moss, who would be satisfied with 50*l*.

Mr. *Swanston* said, that the petitioner would agree to 40*l*.

Mr. *Bacon* said, that, for the reason he had already stated, he would accept the offer.

The order declared, that, under the circumstances of the case, it was fit and proper that 40*l*., part of a sum of 113*l*. in the certificate mentioned, but that no other part thereof, should be allowed to Mr. Moss; and directed, that the petitioner should pay to Mr. Moss his costs of the petition, not exceeding 30*l*. The official assignee's costs in full.

1849.

**Ex parte ANTHONY GEORGE WRIGHT BIDDULPH,**  
**In the Matter of ANTHONY GEORGE WRIGHT BIDDULPH, JOHN**  
**WRIGHT, HENRY ROBINSON, and EDMUND WILLIAM JER-**  
**NINGHAM, Bankrupts;**

*June 6th.*

AND

**Ex parte THOMAS BARNEWALL and Others, in the same**  
**Matter.**

**T**HESE were two petitions, the latter of which was that of the assignees, seeking to expunge or reduce a proof which had been admitted for 7000*l*. The bankrupts were Messrs. Wright & Co., bankers, Henrietta-street, Covent-garden. One of the partners, Mr. John Wright, was interested under the will of a Mr. Anthony Wright. The amount proved was part of a sum standing to the account of the trustees of the will, and had been withdrawn by Mr. John Wright, and subsequently invested upon a mortgage or charge upon the Stort Navigation and Hertford Union Canal, belonging to the trustees of Sir George Duckett, not authorised by the trusts of Mr. Anthony Wright's will. A former petition (*a*) had been presented by the executors of the surviving trustee of the will, for sale of the security, and leave to prove for the difference. Afterwards a petition was presented by the cestuis que trustent, for liberty to prove; and under an order made upon that petition the proof now in question had been admitted, after an investigation and examination of witnesses before the Commissioner with reference to the question whether Mr. John Wright had the authority of Mr. Plowden, the surviving trustee of the will, for withdrawing the fund; it having been alleged that Mr. John Wright had, without any objection from the surviving trustee, exercised the en-

A partner in a bank drew out part of a balance standing to the account of trustees of a will, under which he was interested, without the authority of the trustees, and invested it upon a canal mortgage, which was an unauthorised security:—  
*Held*, on the bankruptcy of the bankers, that the cestuis que trustent were entitled to prove for the whole of the balance, without giving up the canal mortgage.

(*a*) See *Ex parte Burton*, 3 Mont. D. & D. 364, where the facts are fully stated.

1849.  
*Ex parte*  
 BIDDULPH,  
*In re*  
 BIDDULPH;  
 AND  
*Ex parte*  
 BARNEWALL.

tire control of the trust funds and of the account of the trust estate with the banking firm. It was now contended that the evidence before the Commissioner proved Mr. John Wright to have been the agent of the surviving trustee in withdrawing the fund; and that therefore the payment to him was a payment to the trust estate, and discharged the firm. It was further contended, that the petitioners could not take the benefit of Sir George Duckett's mortgage without affirming the transaction; and that at any rate the proof could not stand for the full amount, but only for so much as the proceeds of the security were insufficient to satisfy.

Mr. *Swanston* and Mr. *Amphlett* in support of the latter petition.

Mr. *C. P. Cooper*, Mr. *Bacon*, Mr. *Renshaw*, Mr. *J. A. Cooke*, and Mr. *F. Riddell* appeared for the several respondents, but were not called upon.

The VICE-CHANCELLOR:—

Mr. John Wright has been examined as a witness; Mr. Anthony Wright was alive, and has been, or might have been, a witness. Both were partners at the time of the transaction. In that state of circumstances, it would, in my opinion, be a most unjust and improper estimation of the evidence, to say that it proves an authority, directly or circumstantially, previous or subsequent to the transaction, upon the part of Mr. Plowden, to pay the sum of 7,000*l.* in question either to Mr. John Wright or to his order, or in such manner as Mr. John Wright should direct. The consequence is, that the joint estate has not, in my opinion, discharged itself of its original liability to answer the 7,000*l.* The proof, therefore, must stand, subject to the question as to Sir George Duckett's mortgage.

It so happened, that when the 7,000*l.* was withdrawn

from the bank of Wright & Co., Mr. John Wright invested it upon a mortgage. No doubt that was done with fair and honest intentions. Now, it is said that neither those who represent Mr. Plowden, nor the persons beneficially interested in the capital of Mr. Anthony Wright's estate, can claim the proof without rejecting the mortgage, or claim any benefit from the mortgage without relinquishing the proof. That is not my opinion. The liability of the banking-house arose the instant the money was removed from the banking-house without Mr. Plowden's authority. That liability has never been satisfied, and has never been displaced. The money thus removed, in whatsoever custody it was, still remained part of the estate of Mr. Anthony Wright; and those who were interested in that estate had a right to pursue it, and to make the most they could of it, without relinquishing the liability of the original debtors.

Then comes the question whether such benefit as was derivable from the security ought to go in diminution of the proof. The security was no part of the estate of the bankrupt; it was a collateral benefit, and which ought not to go in diminution of the dividend. The proof for the 7,000*l.*, therefore, was well admitted, and due provision must be made for making Sir George Duckett's security available, and giving the benefit of it to the original testator's estate, so far as necessary to make up the 7,000*l.*, and beyond that to the joint estate from which the 7,000*l.* was taken. The petition must be dismissed, so far as it seeks to expunge or reduce the proof. The dividends upon the proof must be brought into Court, and accumulated until further order.

The order was made accordingly, and extended to several other matters, being made on both petitions.

1849.  
*Es parte*  
 BIDDULPH,  
*In re*  
 BIDDULPH;  
 AND  
*Es parte*  
 BARNEWALL.

1849.

July 7th.

Ex parte JOHN BROWN,

In the Matter of CUTHBERT SMITH FENWICK, a Bankrupt.

The amount of a call made upon a contributory under the Joint Stock Companies Winding-up Act, 1848, before his bankruptcy, may be proved against his separate estate by the official manager, although all the debts of the Company are not paid, for which the contributory is liable.

Where the direction of the Master had not been obtained before a proof was tendered by the official manager under a bankruptcy, but no objection was made on this ground to the admission of the proof before the Commissioner, and the Court, on appeal, was satisfied that the proceeding was not disapproved of by the Master — *Held*, that it was not competent to the assignees to object, on appeal from the Commissioner's decision, that the Master's approbation had not been obtained before the proof was tendered.

**T**HIS was the petition of a creditor seeking to expunge a proof made for a call under the Joint Stock Companies Winding-up Act, the assignees having declined to appeal from the admission of the proof.

The fiat issued on the 24th of January, 1849, on the bankrupt's own petition, directed to the Newcastle-upon-Tyne District Court of Bankruptcy.

Prior to and up to the time of his bankruptcy, the bankrupt was a shareholder in the North of England Joint Stock Banking Company, which was then in course of winding-up, under the Joint Stock Companies Winding-up Act, 1848, and his name had at that time been placed on the list of contributories of the Company. At the meeting held for the choice of assignees, on the 15th of February, 1849, a debt of 11,739*l.* 11*s.* 3*d.* was proved against the joint estate of the bankrupt, by the manager of the Central Bank of Scotland, on a judgment recovered against the North of England Joint Stock Banking Company; and, by virtue of this proof, the Central Bank of Scotland voted in and carried the choice of assignees. At the same meeting, the official managers of the North of England Joint Stock Banking Company applied to prove for the sum of 4918*l.* 9*s.* 11*d.*, the amount of the balance due in respect of the call in question. The affidavit of the official managers, in support of the proof, stated, that the bankrupt was a shareholder of and partner in the North of England Joint Stock Banking Company, at and before the date of the stoppage of the Company down to the date of the fiat, and during all that time held 200 shares therein; and that the Company, on the 8th of March, 1847, stopped payment, and had not since incurred any new debts or liabilities, except what was necessary and requisite for the purpose of winding-up the concerns; and that the Company

was in the course of winding-up its concerns at the date and issuing of the fiat. The affidavit then stated the winding-up order and the proceedings under it; and that, after debiting the said C. S. Fenwick with the amount of the call, there was a balance due from him of 4918*l.* 9*s.* 11*d.*, which had not yet been paid by him; and that the Master had made the following balance-order under the Act:—

1849.  
Es parte  
BROWN,  
In re  
FENWICK.

“29th December, 1848.

“In the Matter of the Joint Stock Companies Winding-up Act, 1848, and of the North of England Joint Stock Banking Company, I, James W. Farrer, the Master of the High Court of Chancery charged with the winding-up of this Company, do order that C. S. Fenwick do, within one month from the date hereof, or within four days after the service hereof, at the banking-house of the North of England Joint Stock Banking Company, pay to the official managers of this Company the sum of 4918*l.* 9*s.* 11*d.*, such sum being the balance now appearing due from C. S. Fenwick on his account with the said Company.

“J. W. FARRER.”

The deponents further stated, that they caused a copy of such balance-order to be personally served on C. S. Fenwick, on the 4th of January last; but that no part of the sum of 4918*l.* 9*s.* 11*d.* had been paid or satisfied by him, but that the same remained due and owing to the deponents as such official managers; nor had they received any security or satisfaction whatsoever.

The Commissioner (Mr. *Ellison*) admitted the proof, giving the following judgment:—

“An order of a Court of Equity for payment of a sum of money is a proveable debt: *Wall v. Atkinson* (a). The

(a) 2 Rose, 196.

1849.

*Ex parte*  
BROWN,  
*In re*  
FENWICK.

Lord Chancellor, in his judgment, says, 'An order of this Court for payment of money has been held to be a debt proveable in bankruptcy, and, as a debt proveable, will be barred by the certificate.' In the case of *M'Williams (a)*, a bankrupt, the bankrupt, pending his examination and as he was returning from it, was arrested by virtue of an attachment issued by the Court of Chancery in Ireland for a contempt in not lodging money in Court pursuant to a decree. The Lord Chancellor said, 'This is a process issued to compel payment of a sum of money due by this man in some shape or other as a debt; to whom due is not material.' In *Ex parte Lawden (b)*, a party entitled to a legacy under a will filed a bill in Chancery against the executor for an account and for payment of his legacy, and obtained an interlocutory order for the payment of a certain sum into Court, after which the executor became bankrupt. The Court refused an order for the legatee to prove for the specific sum mentioned in the order of the Court of Chancery, but gave him leave to go before the Commissioners, and prove for such a sum as might be due to him. The Court said, that it was impossible for the Court to say, on the mere production of the interlocutory order of the Court of Chancery, that the sum mentioned in such order amounted to a conclusive debt; and the application was made before the choice of assignees. By sect. 79 of the Winding-up Act, the list of the contributories is conclusive when settled, unless cause be shewn by the person objecting, to the satisfaction of the Master; and by sect. 99 it is declared, that, except on special leave of the Court, no appeal shall lie against any proceeding of or before the Master relating to the winding-up of the affairs of the Company, after the expiration of fourteen days after the order complained of shall have been made, or

(a) 1 Sch. &amp; Lef. 169.

(b) 1 Mont. D. &amp; D. 583.



after service of the same, in case the party complaining shall not have been present. Mr. Fenwick did not make any objection to the list of contributories as settled by the Master, nor did he appeal against the order of the Master." [The learned Commissioner referred to the 83rd and 84th sections of the Act, and the proceedings before the Master, and stated and read the several orders made by him.] "The effect of these several orders which have been made by the Master under the Winding-up Act, so far as the same in any way relate to Mr. Fenwick, is this, viz., that, before the bankruptcy, the High Court of Chancery declared that Mr. Fenwick was liable in law or in equity to pay the sum of 4918*l.* 9*s.* 11*d.* to the official manager of the Company, such sum being the balance appearing due from Fenwick on his account with the Company; and that an order, called the balance-order, having been made by the Master on the 29th of December, 1848, by which Fenwick was ordered, within one month from the 29th of December, 1848, or within four days after the service of the order, to pay to the official manager the sum of 4918*l.* 9*s.* 11*d.*; and a copy of such last-mentioned order having been served on the bankrupt personally, on the 4th of January last, that it was the duty of Fenwick to pay this sum to the official manager on the 9th January last; the bankrupt, however, did not obey the order, or pay any part of the money comprised in the order; and at the time when he signed and filed a declaration of insolvency, the act of bankruptcy on which the fiat is founded, the whole of the said sum of 4918*l.* 9*s.* 11*d.* was due from him to the official manager: such was the position of the bankrupt, and such were the obligations upon him as a member of the North of England Joint Stock Banking Company, at the time he became a bankrupt. The cases to which I have already referred, for the purpose of shewing, amongst other things, that an order of a Court of equity for payment of a sum

1849.

*Ex parte*  
BROWN,  
*In re*  
FENWICK.

1849.  
*Ex parte*  
 BROWN,  
*In re*  
 FENWICK.

of money creates a proveable debt, seem to me to establish that this sum of 4918*l.* 9*s.* 11*d.*, which Fenwick was ordered by the Master to pay before his bankruptcy, is a debt proveable by the official manager against the estate of Fenwick. Admitting that the obligation upon Fenwick to pay this money was not a legal but an equitable one only, the sum of money is proveable as an equitable debt, inasmuch as the debt existed before and at the time of the bankruptcy; the amount of the debt had then been ascertained, and it has a lawful consideration, being a demand founded (if not upon contract) upon the equitable doctrine of contribution. In the case of *Ex parte Young* (a) it was decided, that a partner, though not a surety strictly, is a person liable within the provisions of the bankruptcy law relating to sureties: and in *Ex parte Watson, Re Sheath* (b) it was decided, that a solvent partner winding up the partnership concerns is entitled to prove under the commission against the bankrupt partners the share of the loss or deficiency which each partner ought to have borne, as a debt against his separate estate." [The Commissioner referred to the case of *Wallis v. Swinburn* (c).] "It is true that a joint stock banking company established under the 7 Geo. 4, c. 46, and other Acts, with power to sue in the name of a public officer, is not to be considered as an ordinary copartnership, but a corporate body; and such joint-stock company is not affected by that which may be known to any individual shareholder; the public officer who represents a fluctuating body sues for the existing body of shareholders, and such existing body of shareholders may be different persons from those who were so at the time when the cause of action accrued: *Powles v. Page* (d), *Steward v. Dunn* (e). Now, though it is quite true that accord-

(a) 3 V. & B. 31.

(b) 4 Madd. 477.

(c) 1 Exch. 203.

(d) 3 C. B. 16.

(e) 12 M. & W. 655.

ing to these cases and others a joint-stock banking company is not an ordinary partnership, I am of opinion, and it seems to me to be clear, that if the affairs of this Company had been wound up before the bankruptcy of Fenwick by the Company themselves, and upon a final settlement of the accounts the amount of the loss incurred had been ascertained, and the amount to be provided for by Fenwick, and his aliquot share of that loss had also been clearly ascertained, and after the bankruptcy of Fenwick his co-shareholders had paid the full amount of the losses, including Fenwick's aliquot share, such co-shareholders would have come within the designation of persons liable for the debt of the bankrupt, within the meaning of the 52nd section, and have been entitled to prove his share of the loss under his fiat as a separate debt due from him to them. But, in this case, have the amount of partnership loss and the aliquot share of the bankrupt partner been ascertained before the bankruptcy? After referring to the proceedings before the Master, I am not prepared to say that this sum of 4918*l.* 9*s.* 11*d.*, is to be considered as the bankrupt's ascertained aliquot share of the loss sustained by the bank, which he ought at the time of the bankruptcy to have provided. If this sum of 4918*l.* 9*s.* 11*d.*, is such ascertained aliquot share, then, in that case, the effect of the Winding-up Act is nothing more than this, viz. to render this sum proveable against the separate estate before all the partnership debts are paid, whereas, if such Act had not passed, the sum would have been proveable against the separate estate, but not until after the payment of all the partnership debts. It is obvious, that it makes no difference to Fenwick's separate creditors, whether such proof is made before or after the payment of the partnership debts. If the actual amount of deficiency of the Company has not been ascertained, and if it must remain doubtful until the affairs of the bank shall have been

1849.

*Ex parte*  
BROWN,  
*In re*  
FENWICK.

1849.

*Ex parte*  
BROWN,  
*In re*  
FENWICK.

finally wound up and settled, and the respective claims of the contributories upon each other and upon the Company shall have been adjusted and settled, whether the whole of the said sum of 4918*l.* 9*s.* 11*d.* was equitably due from Fenwick at the time of his bankruptcy, I am of opinion that the whole of that sum is, nevertheless, now proveable against his separate estate, under and by virtue of the provisions of the Winding-up Act, and upon the grounds which I have already stated, independently of the doctrine of partnership and co-suretyship. I have only to add, that I have given this subject much consideration; and that, for the reasons I have stated, I shall allow this sum of 4918*l.* 9*s.* 11*d.* to be proved by the official managers of the North of England Joint Stock Banking Company against the separate estate of the bankrupt."

Mr. *Swanston*, Mr. *F. S. Williams*, and Mr. *Brooksbank* for the petition.—The deposition on which the proof was received does not state, that the bankrupt is indebted in the amount sought to be proved; and the proof is bad, for three reasons:—

1st. That the direction of the Master to make the proof was not obtained.

2nd. That the official managers, who represent the bankrupt's partners, cannot prove against his estate in competition with the creditors of the concern, or while any of those creditors remain unpaid.

3rd. That the call is not for a sum found to be due upon a final settlement, but may be to an amount much greater than upon such settlement the bankrupt will be liable to pay.

The only provision under which the proof could be tendered is, a qualifying provision at the end of the 88th section of the Winding-up Act of 1848. That section, after authorising the official manager, with the Master's sanc-

tion, to abandon or compound for any claim against a contributory, provides, that nothing therein contained shall discharge the estate of the contributory from the demand, but that it shall be lawful for the official manager to prove for the amount thereof, and receive dividends thereon. Now, it is clear that this provision was intended to save and not to create rights. Many cases may be conceived in which a Company might be entitled to prove against a contributory; and all the provision was intended for was, to prevent any question as to such rights being interfered with by the preceding part of the clause.—They commented on the authorities referred to by the Commissioner in his judgment, and cited *Ex parte Carter (a)*.

1849.  
*Ex parte*  
 BROWN,  
*In re*  
 FENWICK.

The VICE-CHANCELLOR:—

If the new statute had not passed, but all other things had been as they are, I suppose it to be plain enough that such a proof as that in question could not have been sustained in any manner or form. The question is, whether the statute, whatever anomalies may possibly arise, has not made a difference. I think that it very plainly has; and that the sum proved was proveable, subject to the observations which I am about to make. I have alluded to anomalies: the nature of one of them is sufficiently exhibited by the existence, upon the proceedings, of the name of the Central Bank of Scotland for a debt due from the Company. It is an inevitable difficulty; and when it comes into practical operation, the Court must deal with it as it can. Whatever may be the consequence, the Act of Parliament must be pursued and obeyed; which I think would not be the case if this demand were held not to be proveable. I collect, that the point as to the leave of the Master not having been obtained before the proof was tendered, was not raised before the Commissioner; and I apprehend that I ought to consider the objection as waived, subject to this

(a) 2 G. & J. 233.

1849.

*Ex parte*  
BROWN,  
*In re*  
FENWICK.

one remark, that I shall think it expedient to be informed now whether the Master approves of the proof (a).

A witness was examined *vivâ voce*, and stated, that the proceeding had been brought under the Master's notice, and that he had expressed no disapproval of it.

The VICE-CHANCELLOR said, that this was satisfactory; although probably the assignees could not be heard to object, on the ground of the want, of approval.

(a) In order to obviate some of the anomalies alluded to in the above judgment, the following section was introduced into the Joint Stock Companies Winding-up Amendment Act of 1849, s. 30: "And be it enacted, that where any contributory of the Company is a bankrupt or insolvent, it shall be lawful for the official manager to prove, in the matter of such bankruptcy or insolvency, for any balance ordered by the Master to be proved against the estate of such contributory, and to take and receive dividends in respect of such balance in the matter of the bankruptcy or insolvency as a separate debt due from such bankrupt or insolvent, and rateably with the other separate creditors: Provided always, that if any creditors of the Company, not being such petitioning creditor under the fiat as after mentioned, shall have proved or shall prove against the estate of such bankrupt or insolvent contributory in respect of any debt due from the Company, then the dividends received by the official

manager from the estate of such bankrupt or insolvent contributory shall be paid and distributed by the official manager, under the direction of the Master, in the first instance, rateably amongst the creditors of the Company so proving against the estate of such bankrupt or insolvent contributory as aforesaid, until the debts due to such creditors respectively be fully paid, and, subject thereto, such dividends shall be applied by the official managers towards the general purposes of the winding-up of the affairs of the Company: Provided also, that in case any such fiat shall have been issued on the petition of a joint creditor of the said Company in respect of his joint debt, and he shall have proved such joint debt for the purpose of receiving dividends under such fiat, then any dividends paid to such petitioning creditor under such proof shall be set against the dividends payable to such official manager in respect of the proof so made by him as aforesaid, so far as the same will extend."

1849.

Ex parte Moss,

In the Matter of DAVIES, a Bankrupt.

July 9th.

THE bankrupts, being shareholders in a public Company, deposited their shares with the petitioners, who were bankers, as a security for sums advanced by them for the purchase of the shares; but no written memorandum of deposit was made.

Equitable mortgages by deposit of shares in a public Company without written memorandum, held entitled to his costs, on evidence of custom not to give written memorandum.

The mortgagees now presented their petition for a sale of the shares. An affidavit was filed in support of the petition, deposing that it was not the custom, in course of business, on a deposit of shares under the circumstances stated in the petition, to have such a memorandum.

Mr. Bacon, in support of the petition, cited *Ex parte Sheppard* (a).

Mr. Broderick for the assignees.

The VICE-CHANCELLOR held, that the costs ought to be given as in the case of a deposit with a written memorandum.

(a) 2 Mont. D. & D. 431.

1849.

*Aug. 6th.*

Ex parte ROBERT ANDERSON,  
In the Matter of WILLIAM ASH, a Bankrupt.

A loan was made on a deposit of agreements for building leases, with a written memorandum; afterwards the leases were obtained and deposited in lieu of the agreements, but without any fresh memorandum:—*Held*, that, on the usual petition of the equitable mortgagee in bankruptcy, the order ought to be made as in cases of no written memorandum.

MR. HARE appeared in support of the usual petition of an equitable mortgagee, and the only question was as to the costs. The advance had been made on July 1st, 1848, upon the deposit of two agreements for building leases, with a written memorandum, signed by the bankrupt, stating that the bankrupt had deposited the two agreements with the petitioner, and admitting and declaring that the deposit was made to secure the amount advanced, with interest at 5l per cent., and any further sums which might be advanced, together with interest thereon at the like rate. Leases were afterwards granted to the bankrupt, in pursuance of the agreements, and were deposited with the petitioner in lieu of the agreements, but no new memorandum was given.

Mr. Baggallay for the assignees.

The VICE-CHANCELLOR held, that the order must be made as in cases where there is no written memorandum.



1849.

Ex parte NORTHOOTE WILLIAM SPICER and CHARLOTTE  
JAMES,

Nov. 7th.

In the Matter of GEORGE MATHIAS, a Bankrupt.

**T**HIS was the petition of creditors, praying that the bankrupt's certificate might not be confirmed, but might be recalled and cancelled, or suspended.

According to the statements of the petition, and the affidavits in support of it, the bankrupt carried on business as a solicitor, at Glastonbury, originally in partnership with a Mr. James, and upon his decease, which occurred in November, 1845, alone. He was employed by the petitioners, who were the executor and executrix of his late partner, in the business of the executorship. They had signed an authority empowering the bankrupt to receive a sum of 1500*l.* payable to their testator's estate on a policy of assurance in the Provident Life Office, directing him to deposit it, when received, at a particular bankers', in the names of the petitioners, as executors of the late Mr. James. It was further stated, that, instead of so paying the amount, the bankrupt paid it to his own credit at the bankers', to whom he was, as the petitioners believed, largely indebted. The account of the bankrupt's receipts and payments were afterwards taken, and a balance of 1159*l.* was admitted by him to be due from him to the estate.

On the 15th of February, 1848, the petitioners commenced an action against him for that amount. The petition alleged that the bankrupt defended the action vexatiously, and pleaded a set-off of 700*l.* On the 18th of March, 1841, he filed a bill in Chancery, seeking to establish a partnership between himself and the petitioners as executors, and praying for an injunction to restrain proceedings in the action. Judgment was obtained against him in the action.

An attorney employed to receive money and pay it to the client's account, paid it to his own; and, on the client bringing an action, vexatiously defended it, and filed a bill (which was dismissed) to restrain execution. He was afterwards found bankrupt as a scrivener:—*Held*, that the conduct of the bankrupt was not conduct as a scrivener, so as to be capable of being regarded in reference to the allowance of his certificate.

1849.  
Ex parte  
SPICER,  
In re  
MATHIAS.

The bill was afterwards dismissed.

On the 18th of April, 1848, the fiat was issued, the trading found being that of a scrivener.

The bankrupt passed his last examination on the 14th of November, 1848; and on his application for his certificate on the 14th of May, 1849, Mr. Commissioner *Stephen* gave judgment as follows:—

“The bankrupt in this case had carried on business as an attorney, solicitor, and conveyancer, and also as a scrivener; but it is in the latter capacity only that he became or could legally become the subject of a fiat. On the application for his certificate, he was opposed by a Mr Spicer, one of the executors of a Mr. James, with whom the bankrupt had formerly been in partnership in the business of attorney, solicitor, and conveyancer; and the opposition was founded on the bankrupt’s alleged misconduct in respect to a large sum of money, which had been received by him after Mr. James’s death, in the capacity of solicitor to Mr. James’s executors, and for which he was accountable to those executors. It appeared that an indictment had been lately preferred against the bankrupt, charging him with the felonious embezzlement of this money; but that a verdict of not guilty had been returned by the jury, and that the course of the trial had been such as to lead to the inference, that such verdict must be understood as an acquittal upon the merits, and on the ground of absence of felonious intention. Under these circumstances I refused to listen to any opposition founded on the same facts, and involving the same imputation of felonious embezzlement. But Mr. Spicer’s counsel then claimed a right to oppose, on the ground of the bankrupt having improperly (though not feloniously, or so as to subject him to indictment) kept the said sum of money in his own hands, and dealt with it in his own way, instead of paying it over, as he had been directed to do, to the account of the executors;

and, when called upon to refund the balance which he admitted to be due, after taking credit for certain payments which he alleged himself to have made on behalf of the executors, endeavouring to elude the demand by false representations and promises, which he never in fact performed; and, when afterwards an action was brought against him for the recovery of what was due, defending such action vexatiously, and for the mere purpose of delay, and filing, for the same purpose, a vexatious bill in the Court of Chancery. Upon such grounds as these, I thought the opposition might be allowed, notwithstanding the verdict of acquittal as to the charge of felonious embezzlement. It appeared to me, however, that even supposing such misconduct to have been committed by the bankrupt, it could not be considered as committed by him in his capacity of scrivener, in which alone he became liable to the bankrupt law; and I, consequently, doubted whether it could form a legal ground of opposition to his certificate; and I, therefore, deemed it expedient to call for an argument upon these points, before proceeding to any investigation of the matter of fact. Upon the argument which accordingly took place, it was conceded by the counsel for Mr. Spicer, that the money in question did not come to the bankrupt's hands as a scrivener, though he contended, nevertheless, that his misapplication of it, and the dilatory and vexatious means to which he resorted for evading the repayment, must be considered as misconduct committed in that capacity. I do not, however, see how these two propositions can be made compatible; and I think it clear, that no part of these transactions had reference to his capacity as scrivener; and taking this to be so, the words of the Act of Parliament, 5 & 6 Vict. c. 122, seem to exclude the consideration of it as a ground for affecting the bankrupt's certificate; for the words of the 39th section are express, that the Commissioner is to grant or refuse the certificate 'having regard to the conduct of the

1849.

*Ex parte*  
SPICER,  
*In re*  
MATHIAS.

1849.

*Es parte*  
SPICER,  
*In re*  
MATTHIAS.

bankrupt as a trader.' Instances, indeed, may be put (as in the case of gambling and extravagant expenditure) in which misconduct, not immediately committed in the capacity of a trader, may nevertheless be considered as indirectly so committed, because it tends to diminish the funds to which the trade creditors are entitled to look for payment; but such reasoning has no application to the kind of misconduct now in question, which neither directly nor indirectly seems to affect any creditor, except Mr. Spicer, who is not a trade creditor. And though it has been agreed, that a vexatious defence to an action, or a vexatious bill in Chancery, is injurious to the whole body of creditors, as amounting to an improper and wasteful expenditure of money, I find myself unable to accede to such a view of the matter. The state of the authorities is in accordance with my decision in this case. In *Re Crossfield* and *Re Gibbs*, Mr. Commissioner *Holroyd* clearly maintained the doctrine, that where a man is both solicitor and scrivener, it is only his conduct in the latter capacity that can affect his certificate. In *Re Arbuthnot*, indeed, Mr. Commissioner *Fonblanque* expressed an opinion, that gambling by a trader ought to be considered as an offence committed in the capacity of a trader; and that is an opinion, the correctness of which appears unquestionable, but, as already observed, it is one that has no application to the present case, where neither gambling is charged, nor anything else that can be considered as a wasteful application of the bankrupt's funds, to the prejudice of his creditors in trade. As to *Re Thompson*, though the report of it seems to represent Mr. Commissioner *Fane* as having refused the bankrupt his certificate, on the ground of a cheat committed by him as a solicitor or rather as a private individual, I feel no doubt, that if the case were more fully reported, the offence would appear to be referable to his capacity of scrivener. At all events, I do not find that any question was raised before the learned Commis-

sioner as to the sufficiency of such misconduct to affect his certificate, within the meaning of the Act of Parliament; and his attention, therefore, may not have been drawn to the point. Upon the whole, the result is, that the opposition to the certificate, so far as regards the ground hitherto taken, is disallowed."

1849.  
Es parte  
SPICER,  
In re  
MATHIAS.

On the 27th of September, 1849, another meeting was held, at which the certificate was granted.

From this decision the present petition was an appeal.

Mr. *Schomberg*, in support of the petition, contended, that the money was entrusted to the bankrupt in his capacity of scrivener; and that, even if, under the law antecedently to the passing of the Bankrupt Law Consolidation Act, 1849, the certificate could not have been refused, yet, that that enactment, by its 203rd section, made vexatious litigation a ground for refusing the certificate; and that, therefore, the Court could now recal the certificate.

Mr. *Flather*, for the assignees, was not called upon.

The VICE-CHANCELLOR:—

I think myself bound to deal with this petition upon the footing of the law as it stood before the Act of Parliament of the last session, considering that Mr. Serjt. *Stephen's* decision was pronounced in the month of September last, and that the Act did not come into operation until the 11th of October.

That being so, the question of law is, whether upon the facts as they appear,—the conduct in question of the bankrupt was the conduct of the bankrupt "as a trader." Now, the bankrupt was an attorney, and he was made a bankrupt as a scrivener, and the description in the Act of Parliament of a scrivener is, "Scrivener, receiving other men's

1849.

*Ex parte*  
SPICER,  
*In re*  
MATHEIAS.

monies or estates into his trust or custody." In the present case, a sum, in respect of which the bankrupt is alleged to have misconducted himself, was certainly the money of other men, received by the bankrupt into his trust or custody; but I think that it was not money received into his trust or custody by him as a scrivener.

I feel myself obliged to come to the same conclusion with the learned Commissioner,—that this conduct was not conduct of the bankrupt as a trader.

Of course, the advantage to one side or the other does not enter into the reasons for my decision; but, I must observe, that it has this advantage for the petitioner, that, the decision pronounced on this point being on a point of law, the petitioner will be entitled to appeal, as I understand; whereas, if I were to pronounce a decision simply on my view of the merits, in point of fact, there would, as I suppose, be no appeal. I decide on the point of law as the learned Serjeant did.

Petition dismissed, without costs.

1849.

Ex parte EDWARD LORD,

In the Matter of EDWARD LORD, against whom &c.

Nov. 7th.  
Dec. 5th.

**MR. T. H. TERRELL** appeared in support of a petition of one of two bankrupts; against whom a joint fiat had issued, to have the fiat annulled.

The adjudication became absolute on the 27th of September, and was advertised on the 28th.

The present petition was filed on the 18th of October.

**Mr. Swanston** and **Mr. Russell**, for the respondent, objected that the petition was intitled "In the Matter of Edward Lord," and that there was no such matter, the fiat having issued against Edward Lord and William Archer, as appeared upon the petition itself.—They also submitted, that the petition must, on this account, be absolutely dismissed, the time for presenting a petition in a correct form having expired.

A petition of one of the bankrupts to annul the fiat was wrongly intitled:—*Held*, that the Court might, after the expiration of twenty-one days from the insertion of the advertisement, permit the title to be amended, and the petition to be served on the other bankrupt, and that these steps did not render the amended petition a new proceeding, so as to be precluded by the lapse of the twenty-one days.

The VICE-CHANCELLOR referred to *Ex parte Veysey* (a), and said, that the view taken by Lord *Lyndhurst* in *Ex parte Thorold* (b), did not, in his Honor's opinion, preclude the Court from allowing a mere slip in the title of a petition to be corrected.

The petition stood over with leave to amend.

**Mr. Bacon** and **Mr. T. H. Terrell** again brought on the petition.

Dec. 5th.

**Mr. Swanston** and **Mr. Russell** objected to the petitioner proceeding, and contended, that an amended petition was,

(a) 3 Mont. D. & D. 420.

(b) 3 Mont. D. & D. 285.

1849.

*Ex parte*  
LORD,  
*In re*  
LORD.

in fact, a new one, requiring to be re-served; and that, as the affidavits were wrongly intitled, they would require to be resworn. They argued, that a petition could not be considered as a proceeding until it was served on some one at least. That, in *Ex parte Veysey* (a), it had been served on the petitioning creditor, and yet the Court thought that leave could not be given to amend it.—They further objected, that the other bankrupt had not, even now, been served.

The VICE-CHANCELLOR:—

I should certainly proceed to hear this petition if the other bankrupt had been served; but as he has not, I shall allow the petition to stand over, with liberty to serve him.

It was then arranged between the parties that the petition should be dismissed without costs, the petitioner undertaking not to bring any action against the assignees.

(a) 3 Mont. D. & D. 420.



1849.

Ex parte WILLIAM SHEWARD,

In the Matter of WILLIAM SHEWARD, and of THE  
BANKRUPT LAW CONSOLIDATION ACT.

Nov. 16th &  
21st.

**T**HIS was a motion, by way of appeal, to discharge or vary an order made by Mr. Commissioner *Goulburn*.

The respondent, Mrs. Elizabeth Folker, claimed to be a creditor, for 1284*l*., of the appellant, and summoned him before the Court of Bankruptcy, under the 78th section of the Bankrupt Law Consolidation Act (1849), upon an affidavit of debt made under the provisions of that section.

The appellant appeared, and made an affidavit, according to the provisions of the 79th section of the same Act (*a*), that he believed he had a good defence to the demand on the merits, as required by the Act.

He also tendered himself to be examined by the Commissioner; but the respondent's counsel objected to his being examined, and contended that he must enter into a bond.

(*a*) Sect. 79. "That upon the appearance of any such trader so summoned as aforesaid, it shall be lawful for the Court to require him to state whether or not he admits the demand of the creditor, or any and what part thereof; and, if such trader shall admit such demand or any part thereof, to reduce such admission into writing in the form contained in schedule (I.) annexed to this Act; and such admission so reduced into writing, such trader is hereby required to sign, and, being so signed, the same shall thereupon be filed in such Court; and it shall also be lawful for the Court to allow such trader, upon his said appearance, to make a deposition upon oath, in writing under his hand, to be filed in such

Court in the form contained in schedule (J.) annexed to this Act, that he verily believes he has a good defence upon the merits to such demand, or to some and what part thereof; and in such case it shall be lawful for the Court at the same time to require such trader to enter into a bond, according to the form contained in schedule (K.) to this Act annexed, in such sum and with such two sufficient sureties as the Court shall approve of, to pay such sum or sums as shall be recovered together with such costs as shall be given in any action which shall have been or shall be brought for the recovery of such demand, or of any part thereof, in respect of which such deposition shall be made."

*Semble*, that the 79th section of the Bankrupt Law Consolidation Act, 1849, does not render it imperative upon the Commissioners to require a trader, summoned under that section, to enter into a bond.

Upon such a summons, if either the trader or the creditor tenders himself to be examined, his examination ought to be taken. But it is not incumbent on the Court to hear any other witnesses.

1849.  
Es parte  
SHEWARD,  
In re  
SHEWARD.

The Commissioner declined examining him, and made the order now in question, which was dated the 10th of November, 1849, requiring the appellant to enter into a bond according to the form set out in schedule K. to the Bankrupt Law Consolidation Act (1849), in the sum of 1500*l.*, with such two sufficient sureties as the Commissioner might approve of, to pay such sum or sums of money as should be recovered, together with such sum or sums of money as should be given in any action which should be brought for the recovery of the demand of Elizabeth Folker.

Mr. J. V. Prior in support of the motion.—The statute does not make it incumbent on the Commissioner to require a bond. Under the 8th section of the 1 & 2 Vict. c. 110, a trader could not avoid committing an act of bankruptcy, if he could not instantly pay a demand, (however large or suddenly made), or unless he could persuade some one to become surety for him. It was afterwards considered, that this was too harsh a requirement; and that a man might be solvent, and able to meet all his engagements, if proper time were given to him, who might yet, at any particular moment, not have the means of instantly providing for them all, or of inducing any one to become a surety for their payment. The 5 & 6 Vict. c. 122, s. 12, was consequently substituted for the former enactment, and only required an affidavit of the trader, that he believed that he had a good defence to the demand upon the merits. This again seemed in some cases not sufficiently to protect the creditors, and therefore the present Act was so framed, as to leave it to the discretion of the Commissioner in each case, whether a bond should be required or not. In this case, the Commissioner declined to exercise any discretion, or to examine the appellant or any witness, considering it imperative upon him to require a bond. That this was an erroneous view of the Act, seems clear from other sections of it. Thus the 80th section provides, that if the trader, when so summoned, shall not make a deposition that he

has a good defence, and (if required by the Court so to do) enter into a bond, he shall be deemed to have committed an act of bankruptcy. And the 82nd section has the same parenthesis, which can only be explained by supposing the Commissioner to have a discretionary power to require a bond or not.

1849.  
*Ex parte*  
 SHEWARD,  
*In re*  
 SHEWARD.

The VICE-CHANCELLOR suggested, that the parenthesis might have been intended to meet the case which occurred in *Ex parte Stamp* (a), of a trader being incompetent to act.

Mr. Goodeve for the respondent.—Or the qualification may have been intended to provide against an irregularity in the summons, or a demand upon the face of it invalid; in any of which cases a bond would not be called for. But for the qualification it might have been considered, that, even in such cases, it would be imperative upon the Commissioner to require a bond wherever there was an affidavit of debt, and a summons, according to the terms of the Act. And, at all events, one out of many conjectural interpretations of the parenthesis cannot be sufficient to control the express terms of the 79th section. The words which it employs, “it shall be lawful,” are the same as in many cases have been held sufficient to give the subject a right to call on a tribunal to which they are applied to exercise the jurisdiction conferred by them.

Mr. J. V. Prior replied.

The VICE-CHANCELLOR:—

If Mr. Sheward shall tender himself for examination before me, I will examine him; and if Mrs. Folker shall tender herself for examination, I will also hear her.

The motion stood over for the appellant and respondent to appear and be examined.

Mr. Sheward and Mrs. Folker were on this day examined *vivâ voce*.

(a) 1 De G. 345.

1849.  
Es parte  
SHEWARD,  
In re  
SHEWARD.

Mr. *J. V. Prior*, for the appellant, tendered other witnesses to be examined.

The VICE-CHANCELLOR said he would hear the question argued, whether the appellant was entitled to call witnesses on this proceeding.

Mr *J. V. Prior* contended, that, in deciding whether a bond was to be required or not, the Court was acting judicially, and was bound to adopt all the means which the Act gave it of ascertaining the exact state of facts, and for that purpose to examine witnesses *vivâ voce*, if the case required that course to be taken. The exaction of a bond from a trader might involve his ruin, and might therefore be as important a matter as any of those for the determination of which the legislature had conferred powers upon the Commissioners.

The VICE-CHANCELLOR:—

I consider, that, under the Act of Parliament, the Court is not bound to hear witnesses; under which term I do not include the parties to the contest. Being of opinion that I am not bound to hear witnesses, the question then is, whether I can hear them on the present occasion. That question I think it unnecessary to decide, because, if I can hear them, I am of opinion that this is a case in which I ought not to hear them. But I am ready to hear a reply on the evidence as it stands.

Mr. *J. V. Prior* in reply.

The VICE-CHANCELLOR:—

I refuse this motion. But if an enlargement of time is wished, which may be necessary before going again to the Commissioner, that may be given, and probably ought to be given.

I think that either party tendering himself or herself to be examined before the Commissioner ought to be examined.

Motion refused, without costs.

1849.

Nov. 21st &  
23rd,  
Dec. 19th.  
1850.  
Feb. 18th.

Ex parte PHILIP LYTCOTT HINDS,  
In the Matter of JONATHAN HIGGINSON and RICHARD DEANE,  
Bankrupts;

AND

Ex parte JAMES PICKFORD HIGGINSON,  
In the same Matter.

THIS was the petition of joint creditors, praying that certain railway shares might be administered as part of the joint estate of the bankrupts, or that a proof might be admitted on behalf of the joint estate against the separate estate, for the amount of the purchase money paid for the shares. The Commissioner had rejected the proof, and, in giving judgment, stated the facts of the case, in substance, as follows:—

The bankrupts, Jonathan Higginson and Richard Deane, carried on business as merchants, at Liverpool under the firm of Barton, Irlam, & Higginson, and at Barbadoes under the firm of Higginson, Deane, & Stott; Mr. Higginson managing the business at Liverpool, and Mr. Deane at Barbadoes. Between April, 1846, and November, 1847, Mr. Higginson made large purchases of railway shares in his sole name, and apparently on his sole account. No communication was ever made by him to Mr. Deane concerning them, but the shares were charged for in the partnership accounts against Mr. Higginson individually.

Mr. Higginson had the sole management and control of the partnership business, and of its funds; and Mr. Deane did not interfere during the period of the purchases of the shares, but was at Barbadoes, attending to the partnership business there. He did not return to England until August, 1847.

Two partners traded as merchants at Liverpool and Barbadoes, one residing and transacting the business at each place. The Liverpool partner, without the authority or knowledge of the other, laid out partnership monies in the purchase of railway shares in his own name, but on account of the partnership, and in substance declared himself a trustee of the shares for the firm. Afterwards the firm became bankrupt:—*Held*, 1st, that the joint estate had no right of proof against the separate estate of the Liverpool partner for the amount laid out upon the shares; 2nd, that the shares ought to be administered as joint estate, and that the clause as to

reputed ownership did not apply.

Where a party, who upon an original hearing of a petition was represented by the respondent, petitioned for a rehearing, describing himself as resident abroad, he was required to give security for costs.

1849.  
Ex parte  
HINDS,  
In re  
HIGGINSON.

No authority was given by Mr. Deane to Mr. Higginson to invest any of the partnership monies in railway shares, except such authority as might be included in the general power given to him by implication to deal with the partnership funds as he thought fit.

It was stated by Mr. Higginson on his examination, that the shares in question were purchased for the joint account; but there was no entry or document having reference to any such intention.

The book-keeper of the firm on his examination stated, that, where the purposes for which any monies were paid were known, they were placed to Mr. Higginson's general account, and where they were not known, then to his private account, which the deponent understood to be the share account. That, before Mr. Deane's return to England in August, 1847, the book-keeper added the words "share account" to the words "private account" at the heading of the entries as to the monies in question drawn out by Mr. Higginson; and that, previously to this time, those monies of which the book-keeper did not know the destination, were entered in the folio then headed "Jonathan Higginson's private account" only. That the books, upon the face of them, shewed all the monies drawn out by Mr. Higginson from the concern on every account, and the balance due from his private estate to the joint concern. That Mr. Deane, after his return to England, did not examine these books, except in two instances; and that he then only looked at his own private account, and did not look over any other part of the books. That Mr. Deane called occasionally at the office where the books were kept, and where he might have examined them; but that no inquiry or observation was ever made by or to him on the subject of the shares.

On Mr. Deane's examination in December, 1847, he was asked if he had any shares in any railway in Great Britain;

to which he replied: "No, nor any interest in any." No further examination was made of Mr. Deane in reference to the shares in question, and he had returned to Barbadoes.

1849.  
*Ex parte*  
 HINDS,  
*In re*  
 HIGGINSON.

Upon these facts, the Commissioner came to the conclusion, that a fraudulent abstraction was not shewn to have been made of the partnership monies in question, such as would authorise the admission of a proof on behalf of the joint against the separate estate. He considered the case as falling within the authority of *Ex parte the Assignees of Lodge and Fendal* (a), from the circumstance of Mr. Deane having left the sole control and dominion over the partnership property to Mr. Higginson; and also within the cases of *Ex parte Harris* (b) and *Ex parte Smith* (c), not only from the circumstance of this sole control and dominion, but also by reason of entries having been made in the partnership books, from which the application of the partnership monies in the shares in question could have been ascertained. He also referred to the following observation of the Vice-Chancellor in the latter case:—"If one partner be intrusted with the entire management of the partnership concern, and withdraws monies for his separate use, which he duly and openly enters in the partnership books, this is not a fraud which entitles the joint estate to prove against the separate estate; otherwise, if, by the entries in the books, he disguises the transaction, or wholly omits and conceals it." The judgment of the learned Commissioner then proceeded as follows:—"In the case of *Ex parte Yonge* (d), where the proof was allowed, no entries had been made of the bills abstracted; and, in that case, the Lord Chancellor observed, that, 'if the other partners could have known that

(a) 1 Ves. jun. 166.

(b) 2 V. & B. 210.

(c) 1 G. & J. 74.

(d) 3 V. & B. 31.

1849.  
*Ex parte*  
 HINDS,  
*In re*  
 HIGGINSON.

their copartner had applied the copartnership property to his own purposes, from their immediate or subsequent knowledge upon their subsequent dealings, their consent would be implied.' In *Ex parte Watkins* (a), where proof was also allowed, the stock which was vested in one partner as trustee for the firm was sold out, in order to increase his separate estate, without his copartners' knowledge; and his copartners' subsequent conduct was not held to amount to acquiescence. This case may, at first sight, be considered as a strong authority for allowing the proof in the present instance, as here the purchase of the railway shares was certainly made by Mr. Higginson for the purpose of increasing his separate estate, and without his partner's express knowledge; but, in the present case, I think that, considering the opportunities which Mr. Deane had of acquiring full knowledge of the investment of the partnership monies in these shares, his omitting to do so amounted to a tacit acquiescence; so that I do not think that *Ex parte Watkins* is in point with the present. In *Ex parte Turner* (b), the Judges of the Court of Review considered that there was no fraudulent abstraction, although entries were not made of the improper appropriation until after it was discovered, the circumstances having been known to the clerk whose duty it was to keep the books; so that the other partner had the opportunity of immediate knowledge. The only distinguishing feature in the present case is, that Mr. Deane was abroad when the purchases of these shares were made; and it might be said, that therefore the entries in the books might safely be made without giving him any information on the subject. This, however, would not take the case out of the general rule established by *Lodge and Fendal* and by *Ex parte Harris* as to the sole control and

(a) 1 Mont. & M. 57.

(b) 1 Mont. & A. 54; 4 Deac. & C. 169.



dominion over the partnership funds; nor will this remark apply to the period after Mr. Deane's return to England, when the books were open to his inspection, and when, if he had exercised only ordinary diligence, he would have acquired full information on the subject; his negligence in this respect amounting, I apprehend, clearly to an implied consent. Upon these grounds, I consider that the proposed proof cannot be allowed." The Commissioner also referred to *Marsh v. Keating* (a) and *Sadler v. Lee* (b). The question as to the shares being joint estate had also been submitted to the Commissioner, who thought that he had no jurisdiction to decide it.

1849.  
*Ex parte*  
 HINDS,  
*In re*  
 HIGGINSON.

Mr. Bacon, Mr. Malins, and Mr. Baggallay, supported the petition.

Mr. Roundell Palmer appeared for the assignees.

Mr. Russell and Mr. Charles Hall for the separate creditors.

The VICE-CHANCELLOR said, that he agreed with the Commissioner as to the rejection of the proof; and his Honour reserved his judgment on the rest of the case.

The VICE-CHANCELLOR:—

I have considered attentively the examinations, affidavits, and documents forming the evidence in support of this petition and in opposition to it, including the shorthand-writer's affidavit, filed on the 28th of November, and the book or document to which it refers. That a sufficient case was not made for a proof on behalf of the joint es-

Dec. 19th.

(a) 1 Mont. & A. 592.

(b) 6 Beav. 324.

1849.

*Ex parte*  
HINDS,  
*In re*  
HIGGINSON.

tate against Mr. Higginson's separate estate, I expressed an opinion upon a former day, an opinion which continues to appear to me well founded. I think so, whatsoever view it may be proper to take of the question of the title to the railway shares in dispute, upon which mainly, if not solely, my judgment was reserved, namely, this question, whether the railway shares ought to be treated as belonging to the joint estate or to Mr. Higginson's separate estate, which, if not a pure question of fact, is a mixed question of fact and law. And upon it I am now able to say, that the evidence (taken altogether) has satisfied me—first, that the joint estate was the estate which mediately or immediately, directly or indirectly, but which, substantially and truly, paid for the whole of the shares in controversy, namely, the shares mentioned in the balance-sheet as belonging to the joint estate; secondly, that, as a matter of positive fact, and not merely by way of inference or presumption, it is true that Mr. Higginson meant to acquire and did acquire these shares on account of the partnership, though in his own name; thirdly, that, before the bankruptcy, he in effect and substance declared himself to be a trustee, and in truth was a trustee of them for the partnership; fourthly, that, by that character of trustee, as well as by Mr. Deane's ignorance or imperfect knowledge before the bankruptcy of the circumstances of the case, and the obscurity in which the matter of the shares was until that time involved, the operation of the doctrine of reputed ownership is excluded; and fifthly, that upon these grounds the shares mentioned in the balance-sheet as joint estate were properly so mentioned, and ought to be so considered and treated. But the account of Mr. Higginson with the firm must have credit for the sums applied by Mr. Higginson in paying for them. I make an order on the petition, declaring to that effect accordingly. The costs of the petition will, as to those of the petitioner,

be paid out of the joint estate; as to those of the party or parties who opposed it out of Mr. Higginson's separate estate; and as to those of the assignees equally out of that estate and the joint estate.

1849.  
*Ex parte*  
 HINDS,  
*In re*  
 HIGGINSON.

A petition of rehearing was presented by James Pickford Higginson, a separate creditor, who was described in the petition as residing at New York, in America; and the case was on this day re-argued, the books of the firm produced, and the entries in them fully examined and discussed.

1850.  
 Feb. 18th.

On the petition of rehearing coming on,

Mr. Bacon, Mr. Malins, and Mr. Baggallay, for Mr. Hinds, objected to the case proceeding until the petitioner had given security for costs, he being resident abroad.

Mr. Russell and Mr. C. Hall, for the petition of rehearing, contended that it resembled a cross bill, upon which no security for costs was ever called for; and, moreover, that the application for security came too late, and ought to have been made as a distinct motion upon notice.

The VICE-CHANCELLOR held that the application ought to be acceded to.

Security was then given, and the rehearing proceeded.

At the termination of the argument the VICE-CHANCELLOR expressed his adherence in all respects to the judgment already given.

1849.

Ex parte WILLIAM BAINBRIDGE,

Nov. 21st.

In the Matter of JOHN STANTON, a Bankrupt.

Where a trader assigned all his property for the benefit of all his creditors, and, a few days afterwards, sued out a fiat against himself, under which the official assignee took possession of property comprised in the deed, the Court ordered the property to be delivered up to the trustees of the deed, without any deduction in respect of the official assignee's poundage.

ON the 3rd of April, 1849, John Stainton executed an indenture of that date, made between himself of the first part; Charles Thomas Bainbridge, William Bainbridge, and Alexander Cowan, who were his creditors, and were also trustees, named and appointed on behalf of themselves and other creditors, for the purposes therein mentioned, of the second part; and the several persons, creditors of John Stainton, who, by themselves or their respective attornies or partners, should execute the indenture, of the third part. This deed, after reciting that John Stainton was seised of the several freehold messuages or dwelling-houses in Lincoln therein described, and also of the stock in trade, household furniture, and effects, in and upon his dwelling-house, shop, and premises; and reciting that he was justly indebted to the parties thereto of the second and third parts, in the several sums set opposite their respective names in the schedule thereunto annexed, which he was unable to pay in full, and had therefore proposed and agreed to grant and convey all his real estate, and to assign his personal estate and effects, unto the petitioner and his co-trustees, for the benefit of his creditors as therein mentioned, witnessed, that John Stainton released and confirmed unto and to the use of the trustees, their heirs, executors, administrators, and assigns, certain messuages, tenements, or dwelling-houses, shops, and yards; and also assigned and transferred unto them, their executors, administrators, and assigns, all and every his stock in trade, printing presses, and all other his personal estate and effects. And it was thereby declared, that the trustees should stand and be seised of the freehold messuages, shops, and premises, and of the personal es-

tate and effects, upon trusts therein expressed for sale, and for payment proportionally, and without preference or priority, to themselves the trustees, and their partners, and the persons parties thereto of the third part, of the several debts or sums set opposite their respective names in the schedule thereto.

On the 12th of April, 1849, Mr. Stainton sued out a fiat against himself; whereupon one of the trustees presented the present petition, stating that John Stainton procured the fiat to be issued, for the purpose of defeating the trust deed, and against the wish of all his creditors, excepting one Joseph Islip; and that the petitioner and his co-trustees, and all the creditors excepting Joseph Islip, were desirous that the fiat should be annulled. The petition also alleged, that, previously to the issuing of the fiat, the petitioner and his co-trustees, as such trustees as aforesaid, under the indenture took possession of the personal estate and effects of John Stainton, and sold some parts thereof; that, at the time of the issuing of the fiat, there remained in the hands of the petitioner and his co-trustees the sum of 105*l.* 7*s.* 4*d.*, being the proceeds of the sale, deducting auctioneer's charges; and that Theophilus Carrick, the official assignee, required the petitioner and the other trustees to hand over the same to him, without deducting the costs of preparing the deed, or the amount paid by the petitioner and his co-trustees for rent of the warehouse, and for the charges of the men kept in possession of the goods, amounting altogether to 28*l.*, or thereabouts. The prayer was, that the fiat might be annulled, and that John Stainton might be ordered to pay the costs of the application; and that the sum of 105*l.* 7*s.* 4*d.* might be repaid to the petitioner and his co-trustees, to be held and applied by them in payment of the charges therein mentioned, amounting to 28*l.* or thereabouts, and otherwise according to the trusts of the indenture.

1849.

*Ex parte*  
BAINBRIDGE,  
*In re*  
STANTON.

1849.  
Ex parte  
BAINBRIDGE,  
In re  
STANTON.

Mr. *Swanston* in support of the petition.—The fiat is substantially a nullity, since there is no property for it to operate upon, the trust deed being valid against the bankrupt, who sued out the fiat himself.

Mr. *Miller*, for the official assignee, contended, that at all events the official assignee's poundage should be deducted.

The VICE-CHANCELLOR:—

I am not prepared to say that the official assignee is entitled to poundage. Any necessary expenses, any monies properly paid out of pocket, should, I think, be repaid to him.

Mr. *Miller*, for the official assignee, said, that this question had not been submitted to the Court below; and he contended, that the Vice-Chancellor had only an appellate jurisdiction, and could not decide the question in the first instance.—He cited *Ex parte Lowe (a)* and *Ex parte Benson (b)*.

The VICE-CHANCELLOR:—

This petition was presented before the New Act came into operation. I think, therefore, I ought to proceed with it.

Mr. *Bacon* appeared for the bankrupt, and asked that the bankrupt's costs might be paid out of the estate.

The VICE-CHANCELLOR:—

This is not a case in which I can give the bankrupt his costs. The official assignee, I think, should have his costs, and the petitioner's costs should come out of the fund.

(a) 1 Deac. & C. 30.

(b) 1 Deac. & C. 324.

The following was the order:—

This Court doth order, that the said official assignee do forthwith pay over to the said petitioner, and to Charles Thomas Bainbridge and Alexander Cowan, his co-trustees, upon the trusts of the said indenture, the sum of 105*l.* 7*s.* 4*d.* in the said petition mentioned; and all other monies received by him and now in his hands as such official assignee as aforesaid, after deducting thereout any payments properly made by him as such official assignee in respect of the estate of the said bankrupt, and also his costs of and occasioned by this application, when taxed, as hereinafter mentioned; but he is not to retain thereout any sum or sums whatever for his commission or poundage in respect of such monies so received by him as aforesaid; And it is ordered, that the said official assignee do forthwith deliver up to the said petitioner, and to the said Charles Thomas Bainbridge and Alexander Cowan, upon the trusts of the said indenture, all goods and effects, if any, now in his possession, custody, or power, as such official assignee as aforesaid; And it is lastly ordered, that the costs of the said petitioner, of and occasioned by this application, be paid out of the trust monies under the said indenture; And it is hereby referred to William Vizard, Esquire, an officer of this Court, to tax all the aforesaid costs.

1849.  
*Ex parte*  
 BAINBRIDGE,  
*In re*  
 STANTON.

1849.

Nov. 21st.

Ex parte ROBERT WALTER LEONARD, CHARLES ROSSITER, and  
JOHN PERRY,

In the Matter of JAMES CARTER, a Bankrupt.

Petition of a  
petitioning cre-  
ditor to annul  
the fiat, on the  
ground that his  
debt had been  
miscalculated,  
and was insuffi-  
cient to support  
the fiat, dis-  
missed with  
costs, the bank-  
rupt opposing,  
and the assign-  
ees not con-  
senting to it.

**T**HIS was the petition of the petitioning creditors, seeking to annul the fiat for want of a sufficient petitioning creditor's debt. The case made by the petitioners was, that the amount of their debt had been miscalculated, and the fiat sued out inadvertently, the petitioners having forgotten a set-off of 7*l.*, which reduced the debt below 50*l.*

Mr. *Swanston* and Mr. *Mackeson* supported the petition, and submitted that the petitioning creditors were only doing their duty, which was, to have the fiat annulled when they discovered the insufficiency of the debt.

Mr. *Russell*, for the assignees, opposed the petition, and said that there was no other creditor who could sue out a fiat, the others having been parties to a composition deed. The assignees were willing to take the risk of acting under the fiat.

Mr. *Bird*, for the bankrupt, also opposed the petition, and submitted, whether, under the Bankrupt Law Consolidation Act, 1849, there was any jurisdiction to annul the fiat.

The VICE-CHANCELLOR:—

It is unnecessary to decide whether the Court has jurisdiction to annul this fiat, for, assuming that it has, I think, that, as the bankrupt opposes the petition, and the assignees do not consent, I ought not to accede to it.

Petition dismissed with costs.



1849.

Ex parte WILLIAM EDWARDS,

Nov. 24th.

In the Matter of WILLIAM EDWARDS.

**THIS** was an appeal from the decision of the Commissioner, declaring the appellant a bankrupt.

On the 16th of October, 1849, the appellant, being unable to meet his engagements with his creditors, and being in confinement for debt in the Queen's Prison, presented his petition to the Court of Bankruptcy for protection, under the arrangement clauses of the Bankrupt Law Consolidation Act, and, in support of it, made an affidavit in the form set out in Schedule (A b) to the Act, that he had "assets ready to be produced" to the Court "to the value of 200*l*. and upwards." A private meeting was on the 19th of October held, according to the provisions of the Act, at which no creditor attended to oppose; and at this meeting the appellant, being interrogated by the Commissioner as to the nature of the assets, stated, that he had property in Belgium and in France, and also a reversionary interest in property in England, which if sold would realise more than 200*l*. Afterwards, the petitioner being still a prisoner in the Queen's prison, made an affidavit, verifying an extract from the will of a testator named Allen, bequeathing one-fifth part or share of the testator's estate and effects upon trusts for the petitioner's wife for her life, for her separate use, and for her children after her decease. The affidavit stated, that the testator died on the 16th of July, 1829; that the petitioner's wife was still alive, and of the age of fifty-two years; that she had had ten children, of whom the eldest died on the 5th of August, 1843, having acquired a vested interest in her share of the said fifth portion of the residuary estate of the testator, and without having been married, or made any disposition of her share; and

An arranging debtor made the statutory affidavit, that he had assets ready to be produced, to the amount of 200*l*. On being examined, the only account he could give of those assets shewed, that he had some property abroad, and certain rights in reversionary property in this country, but which did not seem capable of realisation:—*Held*, to be shewn that the affidavit was wilfully untrue, and that the Commissioner had properly adjudicated the arranging debtor a bankrupt, although no creditor had intervened.

1849.  
—  
*Ex parte*  
EDWARDS,  
*In re*  
EDWARDS.

that the petitioner was her next of kin, and as such entitled to her share. The affidavit also stated, that the whole of the estate and effects of the testator had not yet been got in; but that a sum of about 3400*l.* had been retained by the trustees of the will, as a portion of the fifth part of the residuary estate bequeathed in trust for the petitioner's wife and children; that an annuitant of 400*l.* per annum was still living, and that the sum set aside by the trustees to meet such annuity, with other property of the testator still remaining undivided, amounted to nearly 10,000*l.*; and that the petitioner's wife received annually, as interest upon the 3400*l.*, (which was invested on various securities,) 170*l.* or thereabouts; and that a further sum of 2000*l.* or thereabouts would accrue, upon the death of the annuitant, who was of the age of fifty-nine or thereabouts, to the fifth share bequeathed to the petitioner's wife and her children: and further, that the petitioner had made inquiries, and ascertained that the present value of the share of his deceased daughter in the said testator's property, subject to the lives of the annuitant and the petitioner's wife, was at the least 200*l.*, and would realise that sum if sold. The affidavit further stated, that, in addition to such present value of the share of the petitioner's deceased daughter, to which he was entitled as her next of kin, he had divers landed estates and personal property in the kingdom of Belgium, and also landed property in the republic of France, and also large debts, accounts, patent and other rights, property, claims, and demands in this country, the whole of very great value, and which ought to produce more than sufficient to pay and discharge all his debts and engagements; on the faith whereof, he was about to propose, under his petition, to pay such debts and engagements in full, by four instalments.

After filing this affidavit the petitioner applied by his

solicitor to Mr. Commissioner *Goulburn* to be brought up to be discharged out of custody, either absolutely or on condition.

The Commissioner, on the 3rd of November, 1849, made an order, which, after reciting the petition, was as follows:—"And whereas, after the filing of such petition, it has been shewn to the Court, that the affidavit filed with the said petition was wilfully untrue, so far as concerned the assets ready to be produced by him: thereupon this Court doth hereby adjudge such petitioner, the said William Edwards, a bankrupt, and doth adjourn all further proceedings in the matter into the Public Court; and this Court doth order and direct, that this its adjudication be advertised; and doth hereby appoint a sitting of the Court, to be holden on Saturday the 24th day of November inst., at eleven o'clock in the forenoon, for the choice of assignees; and another such sitting of the Court, to be holden on Saturday the 12th of January, 1850, at 12 o'clock at noon, for the last examination of the said bankrupt, as in bankruptcy."

From this order the present petition was an appeal, on the grounds that the recital in it was not according to the fact, and that the proceeding had been irregular, as having taken place in the Public Court instead of privately.

Mr. *Kenyon Parker* in support of the appeal.—The 223rd section, upon which alone the adjudication could be founded, provides, that if it shall be shewn to the Court by *any creditor*, that the debts of the petitioner have been contracted by fraud, or if it shall be shewn that the affidavit was wilfully untrue, the Court may adjudicate the debtor a bankrupt. The reasonable construction of this is, that in both cases it must be shewn by a creditor, whereas here no creditor intervened. Moreover, even if the Commissioner had the power so to adjudicate, the adjudication was bad

1849.  
Es parte  
EDWARDS,  
In re  
EDWARDS.

1849.  
*Ex parte*  
EDWARDS,  
*In re*  
EDWARDS.

upon the merits, since there was nothing to shew that the appellant had not assets ready to be produced, of the requisite amount, and certainly nothing to shew that the affidavit was wilfully untrue, so far as regarded the assets ready to be produced by the appellant.

The VICE-CHANCELLOR:—

It is true that certain matters are, by the 223rd section, required to be shewn by a creditor; but this is not one of them. The petitioner has explained what are the assets or supposed assets, by which he means to support the allegation that he has “assets ready to be produced to the Court, to the value of 200*l.* and upwards.” These appear to be the proceeds of a sale of certain rights and interests in reversionary property. It is possible, that the sale may or might produce the amount; but it is merely a possibility. I do not consider that the bankrupt has mentioned any kind of property which comes within the meaning of the expression used in the form prescribed by the Act. Therefore, upon the petitioner’s affidavit alone, and upon his own statement merely, it appears to me that the appellant has been well adjudged a bankrupt; and his petition must, therefore, be dismissed.

1849.

Dec. 5th.

Ex parte WELLS,

In the Matter of WELLS.

THIS was the petition of the bankrupt, appealing from the decision of the Commissioner, granting to the bankrupt a certificate of the first class, but suspending it for six months. The ground of the appeal was, that the assignees had been allowed to oppose the certificate without giving proper notice, the 198th section of the Bankrupt Law Consolidation Act providing, "that forthwith, after the bankrupt shall have passed his last examination, the Court shall appoint a public sitting for the allowance of his certificate (whereof, and of the purport whereof, twenty-one days' notice shall be given in the London Gazette and to the solicitor of the assignees), and, at such sitting, the assignees or any of the creditors of such bankrupt, who shall have given to the Registrar of the Court three clear days' notice in writing of his intention to oppose, may be heard against the allowance of such certificate."

Assignees may oppose the certificate without giving notice.

Mr. *Swanston* and Mr. *Morris*, in support of the appeal, contended, that assignees were, according to the fair import of the section, as much bound to give notice of their intention to oppose as a creditor was; and that there could be no reason for a distinction between the two cases.

The VICE-CHANCELLOR, without hearing Mr. *Russell* for the respondents, said, that, according to the ordinary and proper forms and idiom of the English language, the condition or requisition as to giving notice did not apply to the case of an opposition upon the part of the assignees. Supposing that to be so, it was, however, not decisive, if the subject-matter and the context of the section rendered a departure from that course of interpretation right. But

1849.  
*Ex parte*  
 WELLS,  
*In re*  
 WELLS.

in this case the construction, *primâ facie* right, was also right absolutely. If the bankrupt were taken by surprise, by an opposition upon the part of his assignees, he might apply to the Commissioner for an adjournment, to give him time to meet the opposition. No such application had here been made; the petitioner did not state to the Commissioner that he was taken by surprise, or ask for any delay. The petition must be dismissed, with costs.

Dec. 5th.

*Ex parte* ROBERT BRIERLY,

In the Matter of ROBERT BRIERLY, a Bankrupt.

*Quære*, whether an application to annul a fiat for equitable invalidity should not be made to the Commissioner in the first instance?

THIS was the petition of the bankrupt, seeking to have the fiat annulled for legal and equitable invalidity. The fiat was issued on the petition of a Mr. John Molesworth, who had acted as the attorney of the petitioner, and whose alleged debt, upon which the adjudication was founded, was stated by the petition to be in respect of an undelivered bill of costs for bringing and prosecuting an action on behalf of the petitioner, and of certain sums of money alleged to have been paid on the petitioner's account and at his request, but of which the petitioner stated that he knew nothing whatever. The petitioner stated, that he never was bound or liable to pay these sums, and never authorised the payment thereof, and was not indebted to John Molesworth in any sum of money, beyond, at the utmost, a few pounds; but that, on the contrary, John Molesworth was liable to him for damages in consequence of want of skill and of negligence on the part of John Molesworth in bringing and conducting the action. He further stated, that the fiat was sued out for the purpose of harassing, oppressing, and ruining the petitioner, and of preventing him from suing John Molesworth.

On the petition being called on, application was made for time to answer the affidavits.

1849.  
}  
*Ex parte*  
BRINLEY,  
*In re*  
BRINLEY.

Mr. *Bacon* appeared in support of the petition.

The VICE-CHANCELLOR.—Should not the original application to annul a fiat for equitable invalidity be made to the Commissioner?

Mr. *Bacon*.—This Court has all the jurisdiction which the Lord Chancellor had. The new Act of Parliament has not taken it away.

The VICE CHANCELLOR:—

I apprise you of the objection which presents itself to my mind as possible; but I give no opinion upon it.

The order was, that the petitioner should be at liberty to make such application as he might be advised to the Commissioner, for the purpose of annulling the adjudication, the assignees and the petitioning creditor, by their counsel, thereby undertaking not to raise any objection to such application in point of time: And it was ordered, that the petition should stand over in the meantime, with liberty to apply.

Dec. 21st.

1849.

*Dec. 21st.*  
1850.  
*Feb. 16th &*  
*20th.*

Ex parte SAMUEL CARTWRIGHT, JOHN WARD, ANN his Wife, and THOMAS CARTWRIGHT, ANN CARTWRIGHT, and HARRIET CARTWRIGHT, by SAMUEL CARTWRIGHT, their Father and next Friend;

In the Matter of JOHN YATES, a Bankrupt.

A petition for the appointment of a new trustee in the place of a bankrupt, under the Bankrupt Law Consolidation Act, should be addressed to the Lord Chancellor, and heard by the Court of Chancery.

Where the bankrupt was served with such a petition he was held entitled to his costs.

THIS was the petition of cestuis que trustent under the will and codicil of Joseph Cartwright, who appointed the bankrupt his sole executor and trustee. The will contained no power to appoint a new trustee. The petitioner prayed that the bankrupt might forthwith be removed from continuing to be and to act as the trustee of the will and codicil; and that two new trustees might be appointed for the purposes of the will and codicil, in the stead of the bankrupt; and that Joseph Cope the elder and Edwin Gee might be appointed such new trustees; and for an assignment by the bankrupt. The petition was intitled in bankruptcy, and addressed to the Vice-Chancellor.

Mr. *T. S. Clarke* supported the petition.

The VICE-CHANCELLOR held, that, under the 130th section of the Bankrupt Law Consolidation Act, the application should have been made to the Court of Chancery, and the petition addressed to the Lord Chancellor.

1850.  
*Feb. 16th.*

The petition, having been altered and presented accordingly, now came on to be heard.

Mr. *T. S. Clarke* supported the petition.

Mr. *Southgate*, for the bankrupt, asked for his costs out of the estate.

The VICE-CHANCELLOR thought this reasonable, and made the order accordingly.



1849.

Ex parte MORTIMER and LAWRENCE,

Dec. 21st.

In the Matter of WHINERREY'S DEED OF ARRANGEMENT.

**T**HIS was a petition of two of the creditors of an arranging debtor, named Robert Whinerrey, of Liverpool, leather factor, appealing from an order or certificate of the District Court.

On the 31st of October, 1849, the debtor filed his petition, under the 224th and 225th sections (a) of the Bank-

Upon the hearing of a petition of an arranging debtor to a Court of Bankruptcy for a certificate, that a deed of arrangement has been duly signed by the requisite

majority of creditors, the Court ought to permit relevant questions to be put to the debtor by any creditor; and where the Court had declined to give this permission, the certificate was discharged upon appeal.

(a) Sect. 224 enacts: "That every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six-sevenths in number and value of those creditors whose debts amount to 10*l*. and upwards, touching such trader's liabilities and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding-up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement as if they had duly signed the same; and such deed or memorandum, when so signed, shall not be or be liable to be disturbed or impeached by reason of any prior

or subsequent act of bankruptcy: Provided always, that every creditor shall be accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him."

Sect. 225. "No such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall within such time obtain from the Court an order or certificate of the said Court, declaring or certifying that such deed or memo-

1849.  
*Ex parte*  
 MORTIMER,  
*In re*  
 WHINERY'S  
 DEED OF AR-  
 RANGEMENT.

rupt Law Consolidation Act, 1849, stating that he had suspended his payments on the 26th of July, 1849; and that his creditors were seventy-three in number, and the total amount of his debts 31,750*l.* 15*s.* 2*d.*; and that a deed of composition and inspection, dated the 1st of October, 1849, had been signed by sixty-three creditors, whose debts in the whole amounted to 29,385*l.* 17*s.* 8*d.*; and praying that the Court would declare or certify the due execution of the deed, to the intent that the creditors who had not executed the same might be bound thereby.

On the same day, the arranging debtor, Robert Whinery, caused to be served upon his creditors, including the appellants, a notice, according to the Act, that a deed of composition and inspection between him and his creditors had been signed by six-sevenths in number and value of his creditors; and that he should apply, on the 16th of November, to the District Court of Bankruptcy at Liverpool for an order or certificate, declaring or certifying that such deed of arrangement had been duly signed by or on behalf of a majority of his creditors, according to the provisions contained in the Bankrupt Law Consolidation Act, 1849, in that behalf.

The petition came on before Mr. *J. Yate Lee*, the Registrar of the Court (the Commissioner being absent). The appellants attended by their solicitor, and opposed the petition, on the grounds of undue preference and incorrectness

random of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for the Court within the district of which the trader shall have resided or carried on business for six months next immediately preceding his suspension of payment to make such order or cer-

tificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application; and no creditor, who shall not have had fourteen days notice of any intended application for such order or certificate as aforesaid, shall be bound thereby.

in the accounts; and the solicitor applied to the Registrar for leave to examine the debtor and the inspectors under the deed, who were present, as to the facts alleged; and stated, that, by such examination, it would appear not only that the accounts appended to the deed were incorrect, but that the formalities required by the statute had not been complied with.

The Registrar refused to accede to the application, holding that the Court, being satisfied by the inspectors that the deed was signed by the requisite majority of the creditors, was bound to grant the certificate, acting ministerially and not judicially. He accordingly certified as follows:—

“Memorandum.—That, having been attended this day by Mr. Lowndes, solicitor for the above-named Robert Whinerey, who produced before me, to be filed in this Court, the certificate of Harmood Banner and Harmood Walcot Banner, inspectors of the estate of the said Robert Whinerey under a certain deed of composition, bearing date the 1st day of October, 1849, to the effect that the said deed had been duly signed by or on behalf of a majority of six-sevenths in number and value of the creditors of the said Robert Whinerey, and also the affidavit of the said Robert Whinerey, verifying a certain list of creditors appended thereto: I did, pursuant to the said Bankrupt Law Consolidation Act, 1849, with respect to an arrangement with creditors by deed, declare and certify that such deed of arrangement had been duly signed by or on behalf of such majority of the creditors of the said Robert Whinerey, as aforesaid.” (Signed) “J. YATE LEE.”

Mr. *Swanston* and Mr. *Shapter*, for the petition, submitted, that the grounds upon which notice was required to be served upon the creditors must have been to ena-

1849.  
*Ex parte*  
 MORTIMER,  
*In re*  
 WHINERREY'S  
 DEED OF AR-  
 RANGEMENT.

1849,  
*Ex parte*  
MORTIMER,  
*In re*  
WHINERY'S  
DEED OF AR-  
RANGEMENT.

ble them to be heard upon the question, whether the deed was substantially a compliance with the terms of the Act, that is to say, whether the deed had been *duly* signed by or on behalf of the requisite majority of the creditors.

Mr. *Bacon*, Mr. *Roundell Palmer*, and Mr. *Cairns*, for the debtor, contended, that all that was required by the Act was, that the District Court should have been satisfied that the deed was duly signed by the requisite majority of creditors. It was not practicable for the Court to go into the details of the debtor's accounts; and therefore, if there was no reason for doubting the accuracy of the certificate of the inspectors who had gone into these details, the Court was justified in acting upon it, and was not bound to allow one of a dissatisfied minority to go into an irrelevant and vexatious examination. A *prima facie* case was all that was required; the validity of the deed would depend upon all the requisites being complied with, and not wholly upon the certificate, which was only one of them.

The VICE-CHANCELLOR:—

I apprehend, that, according to the true construction of the Act of Parliament, I am not bound to decline exercising jurisdiction in this case before the matter shall have been brought before the Commissioner personally. So viewing the Act, I ought not to cause the expense or delay that might probably or very possibly be occasioned by taking the course of remitting the point for the personal consideration of the Commissioner.

It cannot be matter of reasonable surprise, that a new enactment of this description, whether worded with more or less care, should be viewed by different minds differently; and, with deference to Mr. Lee, I find myself un-

able to take the view of it which he appears to have done.

The order or certificate which the 225th section authorises to be made was not and is not a superfluous, an unmeaning, act; it was meant to have a substantial operation upon the condition of the debtor and the respective rights of the debtor and his creditors; and it is not to be done without fourteen days' notice to the creditor. The creditor receives notice to attend. He then asks, that a relevant question may be put to the debtor, under the authority or with the permission of the Court, and in the presence of the Court, for the purpose of testing the accuracy of the debtor's statement. That permission is declined to be conceded to him, on the ground that the order or certificate to be made or granted by the Court is an act purely and merely ministerial. I confess that that is not my view of the case. If I had been in Mr. Lee's place, I should have allowed the question, being relevant, to be put to the debtor. As that is my opinion, I am bound to act upon it, and to discharge the order or certificate. My order is confined to that.

1849.

*Ex parte*  
MORTIMER,  
*In re*  
WHINERBY'S  
DEED OF AR-  
RANGEMENT.

1850.

*Jan. 16th.* Ex parte WILLIAM NICHOLSON ALCOCK, HENRY ALCOCK, THOMAS BIRKBECK, WILLIAM ROBINSON, JOHN BIRKBECK, and GEORGE STANSFIELD, Bankers and Copartners, trading under the style or firm of THE CRAVEN BANK COMPANY;

In the Matter of THOMAS WEARING, a Trader Debtor.

A person alleging that he was a creditor of trader served him with a summons, (under 5 & 6 Vict. c. 122), which was dismissed upon the alleged debtor deposing that he verily believed that he had a good defence to the demand. Afterwards, the Bankrupt Law Consolidation Act having passed, the alleged creditor served the trader with another summons for an alleged debt, which was in part composed of the former demand:—*Held*, that the former dismissal was not of itself a sufficient answer to the summons.

THIS was an appeal from the decision of Mr. Commissioner *Ayrton*, dismissing a summons taken out by the petitioners against the respondent.

On the 11th of August, 1849, the petitioners caused the respondent to be duly served with particulars of demand on the part of the petitioners, and the usual notice requiring immediate payment thereof. The particulars comprised two accounts, numbered one and two, the total being 739*l.* 15*s.* 3*d.*

The respondent, not having complied with the petitioners' demand, a summons was issued out of the Court of Bankruptcy for the Leeds District against him, and duly served upon him under the provisions of the Act, 1 & 2 Vict. c. 110, s. 8.

The summons came on to be heard in the Bankruptcy Court at Leeds before Mr. Commissioner *Ayrton*, on the 24th of August, 1849; and, various technical objections having been taken to the summons, the Commissioner dismissed it, with costs.

Thereupon the petitioners commenced fresh proceedings against the respondent; and having learned that he only admitted that the account marked No. 2, was due from him, and that he complained that the petitioners ought not in fairness to proceed against him for the account No. 1, which he considered a joint account, the petitioners limited their demand to the amount due from him on his separate account, being the account No. 1, and caused him to be served with notice under the 5 & 6 Vict. c. 122,

claiming a balance of 378*l.* 9*s.* 1*d.*, and requiring immediate payment thereof; and this demand not having been complied with, the petitioners procured to be served upon the respondent a summons under the provisions of the statute, returnable on the 17th of September, 1849.

On the return of the summons, the respondent appeared and made oath, that he verily believed he had a good defence to the demand of the petitioners. The petitioners being then advised, that, under the Bankrupt Law Consolidation Act, 1849, which was shortly coming into operation, they would be entitled to obtain security for the payment of their demands, applied to the Commissioner, and requested him to dismiss the summons, with costs, instead of subjecting the petitioners to the obligation of commencing and prosecuting an action for the recovery of their demand.

Thereupon the Commissioner made the following order:—

“10th September, 1849.

“Be it remembered, that the within-named Thomas Wearing appeared before me in obedience to the within summons, and made and filed an affidavit of good defence to the demand of the within-named William Nicholson Alcock, Henry Alcock, Thomas Birkbeck, William Robinson, John Birkbeck, and George Stansfield; whereupon I do hereby order that the within summons be, and the same is, hereby dismissed, with costs, as prayed by the plaintiff.”

On the 11th of December, 1849, after the Bankrupt Law Consolidation Act came into operation, the petitioners obtained a fresh summons for the whole demand of 739*l.* 15*s.* 3*d.*; but the Commissioner dismissed the summons, on the ground that one part of the demand was answered by the former affidavit of a good defence, and that there was no precedent for dismissing a summons as to part of a demand only.

1850.  
Es parte  
ALCOCK,  
In re  
WEARING.

1850.

*Ex parte*  
ALCOCK,  
*In re*  
WEARING.

Mr. *Swanston* and Mr. *Birkbeck* supported the appeal.

Mr. *Bacon* and Mr. *Dickinson* were for the respondent.

The VICE-CHANCELLOR adverted to the words "or any part thereof," in the 79th section; and said, that, with deference to the learned Commissioner, he thought it competent to the Commissioner to enter into the question respecting both debts, or at all events one of them; and that the summons ought not to have been dismissed, at least at that stage. His Honour expressed his willingness to hear the whole matter discussed at once as to the propriety of requiring a bond.

After some discussion, it was arranged that a bond should be given.

1849.

March 29th,  
May 30th.

1850.

Jan. 25th.

An agreement was entered into for the purchase of 4000 tons of iron rails, at 12l. 12s. 6d. per ton, according to a section to be delivered by November 1st, 1846; and 11,500l. was to be paid by the purchaser by way of deposit. According to the custom of the trade, this deposit was to be retained by the seller as a security against any damages from the non-performance of the contract. The deposit was paid in bills of exchange. In June, 1846, the purchaser became bankrupt. On the bills becoming due, they were dishonoured:—*Held*, that the vendors were entitled to prove upon two of the bills remaining in their hands.

Ex parte HENRY BOLCKOW and JOHN VAUGHAN,

In the Matter of DONALD MACLEAN, a Bankrupt.

THE petitioners, who carried on business in partnership, under the firm of Bolckow & Vaughan, at Middlesborough, sought to prove against the estate of the bankrupt, upon two bills of exchange for 2000l. each, the proof having been rejected by the Commissioner.

In the month of February, 1846, a contract was entered into between the petitioners and the bankrupt, to the following effect.

"Middlesborough on Tees, 25th of February, 1846."

Memorandum of Agreement between Messrs. Bolckow & Vaughan, of Middlesborough on Tees, and Donald Maclean, Esq., M. P., Wilton Castle, Durham, That the former agree

to the following effect. The deposit was paid in bills of exchange. In June, 1846, the purchaser became bankrupt. On the bills becoming due, they were dishonoured:—*Held*, that the vendors were entitled to prove upon two of the bills remaining in their hands.



to sell, and the latter to buy, 4000 tons of railway bar iron, of good merchantable quality, equal to No. 3 of double or single headed section, to weigh from fifty-six to eighty-six pounds per yard, at 12*l*. 12*s*. 6*d*. per ton, delivered free on board vessel or loaded in railway waggons at Middlesborough. Section to be handed in on or before the 1st of November, 1846, and delivery to commence as soon as convenient to sellers, but not later than the 1st of February, 1847, and to be completed at the rate of 400 tons per month. The rails to be paid for in cash, without discount, on delivery of each parcel; and in case delivery is not taken, buyer to pay on receipt of certificate of every 400 tons being ready at the works or railway warehouse. Sellers agree to transfer this contract to any responsible party the buyer may direct, without, however, relieving him from his responsibility. Buyer further agrees to pay as deposit the sum of 11,500."

1849.  
*Ex parte*  
 BOLCKOW,  
*In re*  
 MACLEAN.

The deposit of 11,500*l*. was provided for in conformity with a custom prevailing in the iron trade, and was intended to be a security to the petitioners for the performance by the bankrupt of the contract on his part, and to be retained against any damages which the petitioners might sustain by reason of his non-performance thereof.

The bankrupt did not make this deposit; and in March following it was agreed between the petitioners and the bankrupt, that approved bills or notes to the amount of 11,500*l*. should be handed by him to the petitioners in substitution of a cash payment, and by way of satisfaction of the stipulation for deposit. Accordingly, on the 11th of March, the bankrupt handed to the petitioners four bills or notes: his promissory note dated 9th of March, 1846, for 5000*l*., payable at six months' date; a bill dated 2nd of March, 1846, drawn by William Wilks on and accepted by the bankrupt for 2500*l*., payable six months after date; and two bills, dated one the 6th, and the other the 9th day of the same month of March, respectively drawn by William

1849.  
*Ex parte*  
 BOLCKOW,  
*In re*  
 MACLEAN.

Wilks on and accepted by the bankrupt, each for the sum of 2000*l.*, payable six months after date.

The petitioners thereupon signed and delivered the following letter or memorandum to the agent of the bankrupt.

“London, March 11th, 1846.

“We have received this day from Mr. Maclean (through Mr. Rogers) the following bills, being the amount of the deposit on the contract for 4000 tons railway bars, dated 9th instant.

£5,000, Mr. Maclean’s note, at six months’ date, to order of Miss. Maitland.

£2,500, Mr. Maclean’s acceptance to William Wilks, at six months.

£2,000, . Do. . Do. . at six months

£2,000, . Do. . Do. . at six months

£11,500.”

The petitioners negotiated the promissory note for 5000*l.* and the bill for 2500*l.*, and retained in their own hands the two bills for 2000*l.* each. The note and bills, on becoming due, were dishonoured, and still remained wholly unpaid.

On the 30th day of June, 1846, the fiat issued. The petitioners alleged, that, from the time of entering into the contract, they had always been ready and willing to perform it; but that, at the time of the issuing of the fiat, the bankrupt had not handed in to them the section referred to by the contract, in accordance with which the iron, the subject thereof, was to be manufactured, nor had any section been subsequently handed in; so that the petitioners were prevented from performing the contract on their part.

After the making of the contract, and throughout the period fixed for the delivery of the iron, the market price

of railway bar iron, similar to that which was the subject of the contract, was considerably less than the price fixed by the contract; so that the contract, if duly carried into effect, would have been a highly beneficial one to the petitioners, and they consequently had, as they alleged, sustained large damage, and to an amount considerably exceeding the amount of the two bills retained by them, and, in fact, exceeding the amount of the whole stipulated deposit.

At an adjourned dividend meeting, held under the said bankruptcy before Mr. Commissioner *Evans*, on the 24th day of January, 1849, for the purpose of receiving proof of debts, the petitioners tendered a proof for 4000*l.* upon the two retained bills of exchange of the 6th and 9th days of March, 1846; but the Commissioner refused to admit the proof. The prayer was, that the petitioners might be allowed to prove for 4000*l.* upon the two bills.

*Mr. Russell* and *Mr. Goodeve* in support of the petition.

*Mr. Bacon* and *Mr. Cole* for the assignees.

The VICE-CHANCELLOR:—

Assuming these petitioners to be entitled to say, that, as far as they are concerned, the apparent transaction was the true one, I am not prepared to say that there can be no right of proof in respect of these bills. What should be the amount proved is a different question. Without expressing or intimating any dissent from the cases which have been decided upon the subject of proofs tendered in respect of unliquidated damages, I am of opinion, with deference to the learned Commissioner, that the existence of the bills of exchange in this case constitutes a valid distinction between it and them. The question remains, whether the apparent transaction was the true one? I am

1849.  
*Ex parte*  
*BOLCKOW,*  
*In re*  
*MACLEAN.*

1849.  
Ex parte  
BOLCKOW,  
In re  
MACLEAN.

not satisfied, upon the present materials, that it was. That question should be investigated in some way.

After some discussion the case stood over for a *vivâ voce* examination.

May 30th.

On this day Mr. Bolckow and Mr. Rogers were examined *vivâ voce* by Mr. *Russell*, Mr. *Goodeve*, and Mr. *Bovill* for the petitioners, and by Mr. *Bacon* and Mr. *Cole* for the respondent.

The VICE-CHANCELLOR said, that the evidence had satisfied him of the good faith of the transaction; and his Honour directed a reference to Mr. Commissioner *Goulburn*, to inquire what, if any, amount of damages had been sustained by the petitioners through the non-performance of the contract, having regard to the circumstances of the case.

The Commissioner, by his certificate, found, that, having heard evidence upon the matters in question, and having had regard to the circumstances which had taken place respecting the note for 5000*l.* and the bill for 2500*l.*, and all the other circumstances of the case, no amount of damages had been sustained by the petitioners through the non-performance of the contract. The Commissioner, however, certified, that he had calculated the damages upon three suppositions, in the event of the Vice-Chancellor differing from him in opinion, and thinking that the petitioners were entitled to claim damages. The damages calculated on the first of such suppositions were taken at the amount of the profit which would have been made by the petitioners, if they had made and delivered the rails pursuant to the contract, which profit would have amounted to 28,500*l.* The damages calculated on the second of such suppositions were taken at the loss which the

petitioners would have sustained if a section had been delivered in pursuance of the contract, and the bankrupt or his assignees had refused to accept delivery of the rails, and the petitioners had thereupon sold the rails to other parties in the market at the prices of iron at the times stipulated for delivery: such loss would have amounted to 15,800*l*. The third of such suppositions was, the difference of price between the sum mentioned in the contract and that in another contract with the Leeds and Thirsk Company, which had been referred to, or the loss which the petitioners sustained by taking the above contract with the Leeds and Thirsk Company in February, 1847, for the making and delivery of 5000 tons of rails at times as near to those mentioned in the contract with the bankrupt as they could do. This last difference or loss amounted to 12,700*l*. But the Commissioner was of opinion and reported, that the petitioners were not entitled to assess damages upon any one of such suppositions.

1849.  
*Ex parte*  
 BOLCKOW,  
*In re*  
 MACLEAN.

The petition now came on to be disposed of.

1850.  
*Jan. 25th.*

Mr. Russell, Mr. Goodeve, and Mr. Bovill, in support of the petition. The only question is, whether the damage sustained by the petitioners does not constitute sufficient consideration for these bills of exchange? It is clear, that the bills could not have been taken out of their hands until the contract had been performed. It is admitted, that the non-performance of it has arisen from the default of the bankrupt and of the assignees, who never delivered the section. They referred to *Gainsford v. Carroll* (a), *Phillpotts v. Evans* (b), *Stewart v. Cauty* (c), *Tempest v. Kilner* (d), *Dunlop v. Higgins* (e), and *Robinson v. Harman* (f)

- (a) 2 B. & C. 624.
- (b) 5 M. & W. 475.
- (c) 8 M. & W. 160.

- (d) 3 C. B. 249.
- (e) 1 H. L. Cas. 381.
- (f) 18 L. J., Exch., 202.

1860.  
*Ex parte*  
 BOLCKOW,  
*In re*  
 MACLEAN.

Mr. *Bason* for the assignees.—No damage is shewn to have been sustained by the petitioners. Their case is merely one of hypothetical loss, and is only a disappointment in making certain expected profit. There was no breach of contract, moreover, before the bankruptcy; the time for delivery of the section had not arrived.

Mr. *Bovill* replied.

The VICE-CHANCELLOR:—

In all the circumstances of this case, assuming no proof to have been admitted upon the proceedings, I am of opinion that these two notes for 4000*l.* ought to have been admitted to proof. The costs of all parties should come out of the estate.

Feb. 11*th*.

*Ex parte* THOMAS HICKIN,

In the Matter of GEORGE ELLINS, a Bankrupt.

Where a clerk assisted his master in perfecting an invention, for which a patent had been obtained, upon an agreement to be paid out of the profits, but which agreement had no reference to his duties as clerk: *Held*, that he was not precluded from proving for his remuneration as a clerk, or from receiving three months' salary in full.

**T**HIS was a petition appealing from the rejection of a proof.

The bankrupt carried on business at saltworks at Droitwich, and also as a banker, under the style of the Stourbridge and Kidderminster Banking Company.

On the 17*th* of June, 1844, the petitioner was engaged by the bankrupt as cashier and book-keeper, and continued from the 17*th* of June, 1844, until the 10*th* of December, 1848, to act in that capacity, without any salary having been paid or agreed upon.

On the 10*th* of December, 1848, the bankrupt was preparing a balance-sheet, for the purpose of laying before his creditors, when the petitioner was requested by him to agree upon the amount of salary to be paid to him; and it

was then arranged between the bankrupt and the petitioner, that the petitioner should receive at and after the rate of 250*l.* per annum, from the 17th of June, 1844. The reason why the petitioner never came to any arrangement, except as aforesaid, was stated to be, that the bankrupt was possessed of a patent for manufacturing salt, and was, as the petitioner knew, expending large sums of money in bringing this patent to bear. The petitioner stated, that the bankrupt had promised him, for the assistance which he had afforded in perfecting the patent, a small share thereof; and that, under these circumstances, he did not press for more money than he actually required for necessities. The claim was for 817*l.* 10*s.*, being the balance due for the petitioner's services at the above rate.

On the 29th of December, 1849, the petitioner applied to prove his debt under the fiat, and to receive three months' wages in full, under the 168th section of the Act; but the Commissioner rejected the proof altogether, on the ground that the petitioner looked to the share in the patent, which was promised to him, for remuneration, and not to any stipulated or agreed sum by way of salary.

The petitioner now stated by his petition and affidavit that he never looked to the share in the patent as a remuneration for his services, except for such additional services as were not within the scope of his duty as cashier and book-keeper. The prayer was, that he might be at liberty to prove his debt under the fiat, and might be declared entitled to receive three months' wages in full.

Mr. Glasse, in support of the petition, cited *Ex parte Harris* (a).

Mr. Bagshawe, jun., was for the assignees.

(a) 1 De Gex, 165.

1850.  
*Ex parte*  
 HICKIN,  
*In re*  
 ELLINS.

1850.

*Ex parte*  
HICKIN,  
*In re*  
ELLINS.

The VICE-CHANCELLOR:—

Upon the evidence before me, I think that the petitioner was a clerk or servant; but the evidence does not shew satisfactorily what the salary was to be. Unless the parties can agree as to the salary, the case must go back to the Commissioner, with a declaration that the petitioner was a clerk.

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March 16th.

Ex parte JOHN CALDWELL,

In the Matter of JOHN CALDWELL, against whom an Adjudication in Bankruptcy has been made.

The circumstance of the affidavit in support of a petition for adjudication being sworn before a Master Extraordinary in Chancery, who was the solicitor of the petitioning creditor, — held not sufficient ground for annulling the adjudication.

THIS was the petition of a trader, appealing from the decision of the Commissioner finding him a bankrupt. The grounds of the appeal were, irregularities in the affidavit in support of the petition for adjudication, and want of any act of bankruptcy. The irregularity principally relied upon was, that the affidavit was sworn before a Master Extraordinary, who was the solicitor to the petitioning creditor.

Mr. *Russell* and Mr. *Wheeler* in support of the petition.— The jurat is improper, and such that an indictment for perjury would not lie upon the affidavit. With regard to the officer before whom it was sworn, it was most improper that he should be the solicitor by whom the proceeding was taken.

The VICE-CHANCELLOR said, that he only desired to hear the respondent's counsel upon the point as to the affidavit being sworn before the solicitor of the petitioning creditor.

Mr. *Swanston*, for the respondent, cited *Ex parte Elford* (a), and *Anonymous* (b).

(a) 2 G. &amp; J. 65.

(b) Mont. 136.



Mr. *Wheeler* in reply.—The change in the bankrupt law renders *Ex parte Elford* no longer applicable. The docket affidavit was a mere preliminary proceeding; whereas the petition for adjudication and the affidavit in support of it constitute the record, and stand in the place of the commission.

1850.  
*Ex parte*  
 CALDWELL,  
*In re*  
 CALDWELL.

The VICE-CHANCELLOR:—

With respect to the attestation, I must hold that this jurat would have been sufficient in the Court of Chancery; and I am not aware of any difference in the practice of the Court of Bankruptcy in this respect. I cannot accede, therefore, to the objection upon this subject. The other objection seems to have more force; and had it not been for the authority of Lord *Eldon*, which has been referred to, I should probably have annulled the fiat on that ground. But giving all the weight which I ought to the difference between the old and the new law, and seeing that there is a material difference in many respects between a petition and a commission, still I do not think that there is difference enough to enable me to annul the adjudication upon this ground, without departing from Lord *Eldon's* authority. I must, therefore, refuse to accede to this objection also.

The case then proceeded; and ultimately the petition was ordered to stand over, with liberty for the petitioner to bring an action.

1860.

March 18th.

Ex parte WOODFORD,

In the Matter of JOHN WILCOCKS, EDWARD WILCOCKS, and  
ALEXANDER FRAZER, Bankrupts.

Where the joint debts of a bankrupt firm had been paid in full, and monies forming part of the separate estate of one of the bankrupts had been set apart to answer certain unclaimed dividends, but without any specific appropriation to that purpose:—  
*Held*, that the creditors entitled to the dividends, on claiming them, were entitled to the interest which had been allowed by the bankers in the interval.

**T**HIS was an appeal, by way of special case, from the decision of the Commissioner. The special case stated in substance as follows:—

On the 17th of July, 1810, a commission of bankrupt was issued against John Wilcocks, Edward Wilcocks, and Alexander Frazer, upon which they were duly declared bankrupt, and assignees were appointed, of whom one only, Samuel Kingdon, now survived.

The amount of debts proved under the commission against the joint estate was 39,770*l.*, and the amount of the joint estate was 34,520*l.*; consequently, there was a balance of 5250*l.* to be provided for out of the separate estates of the several partners.

Alexander Frazer's separate estate was insufficient to pay anything towards the deficiency; consequently, the only funds out of which it could be provided for were the estates of John Wilcocks and Edward Wilcocks.

Edward Wilcocks' estate fell short of the amount required to be raised for his portion of the deficiency of the joint estate by the sum of 98*l.*, which sum was left to be provided for out of the separate estate of John Wilcocks. This estate, however, was more than sufficient for the discharge of its own as well as Edward Wilcocks' share of the deficiency.

On the 7th of May, 1811, a dividend was declared of 11*s.* in the pound on all debts proved against the joint estate.

Subsequently, a second dividend of 8*s.* in the pound was declared.

On the 23rd of May, 1812, a final dividend of 1*s.* in the pound was declared; and interest was allowed on certain

debts which bore interest, up to the time of each dividend, from the date of the commission, and formed parts of the sums allowed for dividend.

On the 25th of August, 1812, the assignees executed a release to John Wilcocks of the surplus of his separate estate, after provision had been made for the deficiency with which it was chargeable.

Messrs. Williams, Sparkes, & Co., then carrying on the business of bankers, in Exeter, under the firm of the General Bank, were duly appointed bankers to the estate at the meeting for the choice of assignees. The firm was afterwards changed, and the assets and liabilities of the bank were taken by Messrs. Sparkes & Co.; and they afterwards sold their business to the Devon and Cornwall Banking Company.

The assignees kept two accounts with bankers: one, their general account; the other, called their "separate account." To the latter account, money was transferred from the general account, to meet dividends, and was the exact sum required for such dividends, but was not in any other manner appropriated thereto. Mr. Lee, an accountant employed by the assignees, paid the dividend to such creditors as applied for the same, by drawing cheques on the separate account. The last dividend so paid was paid on the 31st of October, 1823. The bankers debited themselves with interest on this separate account every half year, it being the custom of the bank to allow interest on accounts current; and this continued to the 30th of June, 1843, when the Devon and Cornwall Banking Company, who had, on the 1st of July, succeeded Messrs. Sparkes & Co., gave notice to the surviving assignees that there was a sum of 1075*l.* 9*s.* 2*d.* standing to their credit, and that they should thenceforth decline to allow any interest thereon.

The assignees did not comply with the provisions of the 5 & 6 Will. 4, c. 29, ss. 6, 7, the whole matter having es-

1850.  
*Ex parte*  
 WOODFORD,  
*In re*  
 WILCOCKS.

1850.  
*Ex parte*  
 WOODFORD,  
*In re*  
 WILCOCKS.

caped their recollection up to the time of receiving the notice from the Devon and Cornwall Banking Company.

On the 17th of July, Francis Hernaman was appointed official assignee; and, on the 16th of October, 1849, he received from the Devon and Cornwall Banking Company the sum of 1116*l.* 10*s.* 5*d.*, being the amount of principal and interest due on the separate account, and including a balance of 3*l.* 18*s.* 9*d.* due on the general account. Since his appointment, he had paid the representative of one creditor of the bankrupts his dividend, but no interest was claimed or paid.

The amount of unclaimed dividends, at the time of the appointment of the official assignee, was 444*l.* 17*s.*, and the interest which had accumulated amounted to 667*l.* 15*s.* 1*d.* John Wilcocks died in 1837, and his personal representatives now claimed the interest which had accumulated on the unclaimed dividends.

On the 7th of December, 1849, an application was made to the Commissioner of the Exeter District Court by John Woodford, a creditor, who had proved a debt of 14*l.* against the estate, for payment of the sum of 6*l.* 6*s.*, being the amount of the second dividend at the rate of 8*s.* in the pound, and of the third dividend at the rate of 1*s.* in the pound, (the first dividend, at the rate of 11*s.* in the pound, amounting to 7*l.* 14*s.*, having been paid to him on the 13th of July, 1811); and it had been paid accordingly. He also claimed interest in respect of the sum of 6*l.* 6*s.* The latter claim was disputed by the solicitor for the personal representatives of John Wilcocks, who applied for an order on the official assignee to pay the amount of the interest to those representatives.

The number of creditors entitled to unclaimed dividends was 428. The dividends had principally arisen from proofs under 5*l.*; and there was little probability that many of such dividends would ever be claimed.

The accumulated interest was equal to 1*l.* 10*s.* in the

pound on the dividends remaining unpaid. This matter having been brought on, and the Commissioner having heard all the parties, postponed his decision until the 18th of February, 1850, when he declared his opinion to be, that Mr. Woodford was not entitled to the accumulated interest, upon the ground that the money in the bank to the credit of the "separate account" remained part of the estate of the bankrupts, according to the authority of *Green v. Weston* (a). And as to the claim of the representatives of the bankrupt, the Commissioner was of opinion that they were not entitled to the sum claimed, inasmuch as the 5 & 6 Will. 4, c. 29, ss. 6, 7, and 12 Vict. c. 106, s. 191, required such money to be paid to the credit of the Accountant in Bankruptcy.

1850.  
*Ex parte*  
 WOODFORD,  
*In re*  
 WILCOCKS.

The opinion of the Court was sought upon the following points:—

First, whether Mr. Woodford was entitled to the sum he claimed?

Secondly, if not, whether the assignees were bound to pay the sum to the Accountant in Bankruptcy or to the legal representatives of the bankrupt?

Mr. *Malins* and Mr. *Willcocks*, in support of the appeal, cited *Ex parte Renshaw* (b), *Ex parte Holford* (c), *Ex parte Doxat* (d). They also referred to *Ex parte Jamieson* (e).

Mr. *Russell* and Mr. *T. H. Terrell*, for the representatives of the bankrupt *Wilcocks*, claimed the accumulations of interest, on the ground that the separate estate of their testator had overpaid what was due from it.

Mr. *Follett* was for the assignees.

The VICE-CHANCELLOR:—

The bankers having no claim to the interest, there re-

(a) 3 Myl. & Cr. 388.

(b) 4 D. & C. 483.

(c) 4 D. & C. 798.

(d) Cited 4 D. & C. 483.

(e) 3 Mont. & A. 715.

1850.

*Ex parte*  
WOODFORD,  
*In re*  
WILCOCKS.

main but three parties who can be entitled,—the creditors, the personal representatives of the bankrupt from whose estate the fund has arisen, and the public. Any claim on the part of the public appears to me not sufficiently plausible to require even service on the Attorney-General. There remain, therefore, only the creditors and the representatives of the bankrupt. The assignees having kept two distinct accounts, one of which appears to have comprised only the dividends due to the creditors, I think that those dividends must be treated as their property. Probably the Commissioner would have so decided, had the cases now cited been called to his attention.

Costs out of the aggregate fund

March 25th.

*Ex parte* EMMA GRACE MARSHALL,

In the Matter of WILLIAM HASKAYNE, a Bankrupt.

Where a trustee invested part of the trust monies upon a mortgage, with a power of sale, and a trust for the mortgagor, in the event of there being a surplus, and became bankrupt, —*held*, that the mortgagor was not a necessary party to a petition, under the Bankrupt Law Consolidation Act, for the appointment of a new trustee.

THIS was a petition under the Bankrupt Law Consolidation Act, 1849, for the appointment of a trustee of a will in the place of the bankrupt. Part of the testator's assets had been advanced by the trustees upon a mortgage, with a power of sale, and a declaration of trust as to the surplus, (after paying the mortgage debt and interest), for the benefit of the mortgagor. A question was suggested, whether the mortgagor was a necessary party to the petition under the terms of the Act.

Mr. *Baggallay* supported the petition.

The VICE-CHANCELLOR held that the order might be made without the mortgagor being before the Court.

1850.

Ex parte JOHN JONES,

In the Matter of JOHN JONES, a Bankrupt.

March 11th  
& 26th.  
May 29th.

**T**HIS was the petition of the bankrupt, appealing from the refusal of the Commissioner to discharge him from prison, under the 112th section of the Bankrupt Law Consolidation Act, 1849, providing, that where a bankrupt, who has surrendered and obtained his protection, is in prison for debt at the time of his obtaining such protection, the Court may, except in certain specified cases, order his immediate release, without prejudice to the rights of the detaining creditor, except the right of detaining the bankrupt in prison whilst protected by the order of the Court.

According to the petition and the affidavits in support of it, the respondent Mr. George Haigh and his partner Mr. Brabner had been employed by the bankrupt as his solicitors in certain proceedings in Chancery, instituted by him against another solicitor formerly employed by him. The proceedings were ultimately compromised; but during their progress, and before the compromise was effected, Messrs. Brabner & Haigh requested the petitioner, as he now stated by his affidavit, to give them security for their costs, and for any further costs to be incurred or advances made by them; and accordingly, on the 13th of July, 1846, the petitioner executed a mortgage to them for securing any sum which might be or become due, not exceeding 2000*l*.

He had, a few days previously, executed to the mortgagees a warrant of attorney for securing 500*l*., on which judgment was immediately entered up. Contemporaneously with the execution of the warrant of attorney, Messrs. Brabner & Haigh gave to the petitioner the following memorandum:—

A bankrupt, who had unsuccessfully applied to be discharged from imprisonment under the protection clause of the Bankrupt Law Consolidation Act, 1849, renewed his application after his last examination:—*Held*, that it was to be regarded as an original application, and that its refusal gave a new right of appeal.

Where a bankrupt is in prison when he obtains his protection, the Court will not order him to be discharged, unless it appears that his discharge will be useful in the administration of his estate.

*Quare*, whether costs of proceedings in bankruptcy before the Vice-Chancellor are within the 249th section of the Bankrupt Law Consolidation Act, 1849.

1850.

*Es parte*  
JONES,  
*In re*  
JONES.

“(Private). ”

“Dear Sir,—We take it that our advances to and on your account will be about 500*l.*, for which you consented to give the warrant of attorney, on an understanding that before we issue writ of execution we should speak to you on the subject.

“Yours truly,

“2nd July, 1846.

“BRABNER & HAIGH.”

“John Jones, Esq.

On the 11th of April, 1849, the petitioner was arrested (as he deposed, at the instigation of George Haigh) on an attachment for not having put in his answer to a bill in equity, and he was thereupon taken to Lancaster Castle on the 13th of April then instant.

On the 17th of April, 1849, Mr. Haigh lodged a detainer against the petitioner, under which and a detainer of another creditor, the petitioner still remained in custody. He afterwards put in his answer to the bill in equity.

Subsequently, he filed his petition in the Insolvent Court at Lancaster; but was advised, that, being a trader, he ought properly to apply to the Court of Bankruptcy. On the 13th of July, 1849, he sued out the present fiat against himself, and, having surrendered, obtained his protection.

On the 17th of July, 1849, he made an application to the Commissioner *Stevenson*, to be discharged from custody, by virtue of his protection; but the Court refused to make any order.

The following was the memorandum then made by the Commissioner:—

“Upon an application this day made by Mr. Bolden, as attorney for the bankrupt, for the discharge of the bankrupt out of custody, and also to examine Mr. Geo. Haigh, the detaining creditor of the said bankrupt, respecting his dealings and transactions with the bankrupt, he having been duly summoned for that purpose and present in Court,



and after hearing Mr. Lowndes on behalf of Mr. Haigh, I do order that such application for the bankrupt's discharge be refused; and I also refuse to allow Mr. Haigh, the detaining creditor, to be examined respecting his dealings and transactions with the bankrupt with reference to the debt under which the bankrupt is now detained in custody, such examination appearing to me to be proposed to be made on behalf of the bankrupt with the view to the present application for his discharge, and not for the purposes of the bankrupt's estate."

1850.  
*Ex parte*  
 JONES,  
*In re*  
 JONES.

An appeal against this order was dismissed, as not having been brought within the time limited by the Bankrupt Law Consolidation Act, 1849.

Afterwards, the bankrupt passed his last examination, and again applied to be discharged; whereupon the Commissioner made the following memorandum:—

"Mr. Bolden, the solicitor for the bankrupt, having this day renewed his application to examine Mr. Haigh, and to discharge the bankrupt; and on referring to the file of proceedings in this bankruptcy, I find that, on the 14th day of January last, I did adjudicate upon the same matters; and it being declared by Mr. Bolden that he had no new grounds to assign (except the circumstance that the bankrupt has this day passed his last examination), I decline to rehear the matters then decided by me, or to make any further order on the subject."

From this decision the petitioner now appealed, and prayed that the Court would order his immediate release from custody, either absolutely or upon such conditions as the Court should think fit, or would order the application made by the petitioner for his discharge from custody to be remitted back for the consideration of the District Court, with directions that the petitioner should be at liberty to examine Mr. George Haigh respecting his dealings and

1850.  
*Ex parte*  
 JONES,  
*In re*  
 JONES.

transactions with the petitioner in all matters relating to the debt for which the petitioner was then in custody.

Mr. *Malins* and Mr. *Jolliffe* supported the petition.

Mr. *Bacon*, for the creditors, objected that it was a mere contrivance, for the purpose of appealing after the statutory time. He referred to *Sanderson's case* (a).

The VICE-CHANCELLOR said, that, since the former application, the circumstances of the case had been varied by the bankrupt having passed his last examination, and having undergone further imprisonment. The second application to the Commissioner did not, therefore, seem to be a mere repetition of the former, nor did the case appear to his Honour to be within the reason upon which *Sanderson's case* was decided.

*March 26th.* The case, having stood over for affidavits to be filed, came on to be argued upon this day.

Mr. *Malins* and Mr. *Jolliffe*, for the bankrupt, relied upon the section of the Act above referred to.

Mr. *Bacon*, for the opposing creditors, contended that the provision in question was framed for the benefit of the creditors, and not of the bankrupt.

The VICE-CHANCELLOR:—

The bankruptcy was of the bankrupt's own seeking. He made himself a bankrupt, and took this course after filing a petition in the Insolvent Debtors' Court, which he abandoned in favour of a bankruptcy. All considerations belonging peculiarly to a case in which a person has been

(a) 3 De G. & S. 66.

made a bankrupt unwillingly or by a creditor, are out of this case. The matter stands thus: In 1847 a judgment was obtained in an action of assumpsit against the bankrupt (an adverse action) by consent upon the eve of trial. The judgment was complete in 1847, and no step was taken, as I understand, in equity or otherwise, to invalidate, impeach, or question it. I must assume that judgment to be legally and equitably sustainable. Is there, however, any ground for believing that the principal money due on the judgment has been discharged or diminished? Even if the interest has been discharged, it does not appear that the principal has been discharged or diminished. I must take it to be an existing *bonâ fide* debt due from the bankrupt. He will be discharged from it if he shall obtain his certificate, without which he cannot be discharged, unless under the terms of the clause of the Act which has been referred to. Now it has not been shewn to me that his<sup>d</sup> discharge from imprisonment would be useful to the administration of his estate. So far (if at all) as the Act affords any guide as to the grounds on which this discretionary power is to be exercised, the present case does not appear to me to be one within the intention of the Act.

If the debt of the detaining creditor were suspicious, or reasonably questionable, that might or might not be a ground. But upon that point, I wish to intimate no opinion. I see no ground on which I can act in the present case, and must dismiss the petition, with costs.

1850.

*Ex parte*  
JONES,  
*In re*  
JONES.

An order having been drawn up accordingly, and the costs not having been paid, May 29th.

Mr. Bacon on this day moved on behalf of the respondent for a writ of *capias ad satisfaciendum* for 97*l.* 16*s.* 10*d.*, being the amount of the costs as taxed. The application

1850.

*Ex parte*  
JONES,  
*In re*  
JONES.

was made under the 249th section of the Bankrupt Law Consolidation Act, 1849, which provides that "the Court" may in all matters before it award such costs as to such Court shall seem fit and just; and that, in all cases in which costs shall be so awarded against any person, it shall and may be lawful for "such Court" to cause such costs to be recovered from such person, in the same manner as costs awarded by a rule of any of the superior Courts at Westminster may be recovered. In support of the motion, he referred to the 1 & 2 Vict. c. 110, s. 18, making an order whereby any costs are payable of the same force as a judgment, and to the General Orders in Bankruptcy giving the forms of writs of fieri facias in such a case. Those Orders did not give any form of a capias, and therefore a special application became necessary.

The VICE-CHANCELLOR said, that, according to the interpretation clause of the Bankrupt Law Consolidation Act, 1849, "the Court" meant the Court of Bankruptcy, and the Act did not appear clearly to constitute any Vice-Chancellor a part of the Court of Bankruptcy. He could not make an order for imprisonment under a doubtful authority. The only order which he could make would be the ordinary four-day order.



